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In The Supreme Court
of the
United States

OCTOBER TERM, 1986

ROZAY'S TRANSFER, A
CALIFORNIA CORPORATION,
Petitioner,
vs.
SOUTHWEST ADMINISTRATORS, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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November 21, 1986

QUESTIONS PRESENTED

1. May a trust fund bring a collection action pursuant to Sections 502(a) and 515 of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1132(a), 1145 on a fraudulently procured collective bargaining agreement when the fraud was aided and abetted by the Trust Fund's selective disclosure of information?

2. May a trust fund bring a collection action pursuant to ERISA §§ 502(a) and 515 to collect pension contributions arising from a fraudulently procured collective bargaining agreement which has been rescinded and declared void?

3. May a side agreement executed simultaneously with a collective bargaining agreement modify the employer's ERISA pension fund obligations contained in the collective bargaining agreement?

LIST OF PARTIES

AND RULE 28.1 LIST

The parties to the proceeding below were the petitioner Rozay's Transfer ("Rozay's")* and respondent Southwest Administrators, Inc. Southwest Administrators, Inc. is the assignee of the Western Conference of Teamsters Pension Trust Fund (the "Trust"), a multi-employer pension plan as defined by subsections 3(2) and 3(37)(A) of ERISA, 29 U.S.C. §§ 1002(2) and 1002(37)(A). Local Freight Drivers, Local 208, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America ("Teamsters Local 208") filed a motion to intervene with the United States Court of Appeals for the Ninth

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* Petitioner Rozay's has no parent companies, subsidiaries, or affiliates to list pursuant to Rule 28.1.

Circuit (the "Ninth Circuit") which was denied. Counsel for Teamsters Local 208, however, was permitted to argue as amicus curiae at oral argument.

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SOUTHWEST ADMINISTRATORS, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner Rozay's respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Court of Appeals for the Ninth Circuit rendered in these proceedings on June 10, 1986 and amended on August 28, 1986.

OPINIONS BELOW

Respondent Southwest Administrator's, Inc. filed a collection action, Southwest Administrators, Inc. v. Rozay's Transfer ("Southwest Administrators"), against Rozay's pursuant to Sections 502(a) and 515 of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1132(a), 1145 to collect disputed pension contributions allegedly due for the period between May 1982 and February 1983. The Honorable Mariana R. Pfaelzer, United States District Judge for the Central District of California, found that Teamsters Local 208 defrauded Rozay's into signing the 1981-1984 collective bargaining agreement which gave rise to the disputed pension obligations. The district court described this deception as "a disgusting

set of facts" and "the most unfair conduct I have ever seen." (App. A, p. A-5.)* The district court, nevertheless, held that Teamsters Local 208's fraud was no defense to the Trust's collection action.** Rozay's appealed to the Ninth Circuit Court of Appeals ("Ninth Circuit").

While the Southwest Administrators litigation was proceeding in the district court, Rozay's, on October 26, 1984, filed a complaint against Teamsters Local 208 for fraud, captioned Rozay's v. Local

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* "App. A, p. A-5" refers the Court to page 5 of Appendices attached hereto. The reporter's transcript of a special status conference to announce the district court's decision is reproduced as Appendix A, infra, A-1--A-8. Similar references will be used throughout this Petition for a Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit.

** The district court's unpublished findings of facts and conclusions of law are reproduced as Appendix B, infra, A-9--A-23. The district court's amended findings of fact and conclusions of law are reproduced as Appendix C, infra, A-24--A-27.

Freight Drivers, Local 208, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America ("Rozay's v. Local 208"), Case No. CV 84-8313 MRP (Bx).* On January 30, 1986, while the Southwest Administrators case was pending before the Ninth Circuit, the district court issued a minute order in Rozay's v. Local 208 which rescinded the 1981-84 collective bargaining agreement, the same agreement upon which the Trust bases its claim for delinquent contributions.**

Rozay's notified the Ninth Circuit of the district court's minute order in

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* On September 13, 1984, the district court denied Rozay's motion to file a third party complaint against Teamsters Local 208 in Southwest Administrators. The Court denied Rozay's motion, in part, because it believed that the third party complaint would delay the prosecution of the Trust's claim and would, therefore, be contrary to ERISA public policy.

** This order is reproduced as Appendix D, infra, A-28--A-29.

Rozay's v. Local 208. On March 17, 1986, Rozay's filed a motion to continue the oral argument in the instant appeal until the district court issued findings of fact and conclusions of law in Rozay's v. Local 208, arguing that the district court's rescission of the 1981-1984 collective bargaining agreement in Rozay's v. Local 208 may render moot the Trust's claims in Southwest Administrators. The Ninth Circuit denied Rozay's motion but requested that the parties address at oral argument the effect of the district court's rescission of the collective bargaining agreement on the disputed pension obligations. Oral argument was heard on April 10, 1986.

On June 10, 1986, the Ninth Circuit affirmed the district court.* The Ninth Circuit held that so long as William S.

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* This opinion is reproduced as Appendix E, infra, A-30--A-63.

Rozay ("Mr. Rozay"), the President of Rozay's, was aware that he was signing a collective bargaining agreement, Teamsters Local 208's fraud, no matter how deceptive and critical to the disputed pension obligation, was no defense to the Trust's action.

On June 24, 1986, Rozay's filed with the Ninth Circuit a timely petition for rehearing and suggestion for rehearing en banc. Eight days later the district court entered findings of fact and conclusions of law in Rozay's v. Local 208 which declared the 1981-1984 collective bargaining agreement to be void and ordered it rescinded.* On July 9, 1986, Rozay's moved to supplement its petition for rehearing and suggestion for rehearing en banc in Southwest Administrators to

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* These unpublished findings of fact and conclusions of law are reproduced as Appendix F, infra, A-64--A-84.

include the district court's findings of fact and conclusions of law in Local 208 v. Rozay's. This request was granted by Ninth Circuit order, dated July 28, 1986.

In response to Rozay's petition for rehearing and suggestion for rehearing en banc, the Ninth Circuit, on August 28, 1986, amended its previous decision. However, the Ninth Circuit denied Rozay's petition for rehearing and rejected the suggestion for rehearing en banc.* The Ninth Circuit did not address the effect on its subject matter jurisdiction of a labor contract declared rescinded and void.

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* This order is reproduced as Appendix G, infra, A-85--A-87. The Ninth Circuit's decision has not yet been reported.

JURISDICTION

The initial decision of the Ninth Circuit was issued on June 10, 1986. The Ninth Circuit, by order dated August 28, 1986, amended its earlier opinion but denied Rozay's petition for rehearing and rejected the suggestion for rehearing en banc. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) for review by a writ of certiorari.

STATUTES INVOLVED

This case involves the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001 et seq. Also relevant is Section 302 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 186.

Section 515 of ERISA, 29 U.S.C. § 1145, provides in pertinent part:

> "Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement."

Section 302 of the LMRA, 29 U.S.C. § 186, provides in pertinent part:

> "(a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value--

"(1) to any representative of any of his employees who are employed in an industry affecting commerce; or

"(2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or

"(3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or

"(4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.

"(b) . . .

"(c) The provisions of this section shall not be applicable . . . (5) with respect to money or other thing of value paid to a trust fund established by such representative,

for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): Provided, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where

> the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities; . . ."

The provisions of ERISA Sections 2(a), 3(2), 37(A), and 502(a), 29 U.S.C. §§ 1001(a), 1002(2), 1002(37)(A), and 1132(a) and Section 1254(1) of Title 28 of the U.S. Code are reproduced in Appendix H, infra, A-88--A-99.

STATEMENT OF THE CASE

Prior to September 30, 1981, Rozay's, a small trucking company, and Teamsters Local 208 were parties to a 1978-1981 collective bargaining agreement. (App. B, p. A-11--A-12.) Pursuant to this agreement, Rozay's made monthly contributions on behalf of its employees to the Trust. (App. B, p. A-12.)

After the agreement had expired, and while negotiations were continuing over the terms of a successor agreement, Rozay's continued to make contributions to the Trust pursuant to the terms of the agreement. (App. B, p. A-12.) On June 11, 1982, Rozay's, beset by economic difficulties, sent a certified letter to Teamsters Local 208 proposing specific concessions, including cessation of pension contributions. (App. B, p. A-14.) Teamsters Local 208 did not reply. (App.

B, p. A-14.) On June 28, 1982, Rozay's sent a second letter to Teamsters Local 208, stating that Rozay's assumed that Teamsters Local 208 had no objection to the proposed changes and that the changes would be implemented on July 6, 1982. (App. B, p. A-14.) When Teamsters Local 208 did not respond to the second letter, Rozay's implemented the proposed changes. (App. B, p. A-15.)

In September 1982, several months after Rozay's implemented the changes, Teamsters Local 208 filed an unfair labor practice charge with the National Labor Relations Board (the "NLRB"), and in November 1982, it amended the charge specifically to allege that the cessation of pension contributions constituted an unfair labor practice. (App. B, p. A-15.) Teamsters Local 208 also filed a grievance alleging that cessation of pension

contributions violated the collective bargaining agreement. (App. B, p. A-15.)

On January 17, 1983, while the NLRB charge and the grievance were pending, Mr. Rozay, Maurice E. Anderson, then the director of the Western Conference of Teamsters, and Archie Murrietta, President of Teamsters Local 208, met and settled the charge and grievance. (App. B, p. A-15--A-16.) Under the terms of the settlement, Rozay's and Teamsters Local 208 would execute a collective bargaining agreement under which Rozay's would resume making the 98 cents per hour pension contributions prospectively. (App. B, p. A-16; App. F, p. A-72.) In exchange, Teamsters Local 208 agreed to accept lower wages of $1.00 per hour. (App. B, p. A-16; App. F, p. A-72.) It was also agreed that Rozay's would not be obligated to pay the unpaid pension contributions for the previous months. (App. B,

p. A-16.) By this agreement, Rozay's would not exacerbate its already precarious financial situation because the prospective resumption of pension contributions would be offset by the wage reduction. (See App. F, p. A-72, A-76.) The parties also agreed to reduce some fringe benefits in the collective bargaining agreement. (App. B, p. A-16.)

The subject of the unpaid pension contributions was specifically discussed by the parties. (App. B, p. A-16, A-18.) Mr. Rozay expressed serious concerns about being required to make retroactive pension fund contributions for the period between May 1982 and February 1983. (App. E, p. A-34.) Murrietta and Anderson agreed to contact the Trust and request a waiver of the obligation to make contributions for this period. (App. E, p. A-34--A-35.) Murrietta and Anderson assured Mr. Rozay that the delinquent payments would be

forgiven, noting that the Trust had waived the unpaid pension contributions of other employers under similar circumstances. (App. E, p. A-35.)

Following the January 17, 1983 meeting, Mr. Rozay sent a letter dated January 21, 1983 to Murrietta with a copy to Anderson, confirming the terms of the January 17, 1983 agreement. (App. B, p. A-17.) Mr. Rozay stated in his letter that under the agreement, retroactive contributions would not be required. (App. B, p. A-17.) In his reply letter, Murrietta did not deny Mr. Rozay's characterization of the settlement agreement as it related to pension contributions. (App. B, p. A-17.)

Pursuant to the settlement, on January 26, 1983, Murrietta wrote the Trust on behalf of Rozay's, requesting relief from payment of the retroactive pension contributions. (App. B, p. A-17.) In this

letter, Murrietta described the January 17, 1983 agreement and explained that both Rozay's and Teamsters Local 208 wished to waive the unpaid pension contributions. (App. B, p. A-17.) A copy of this letter was sent to Mr. Rozay. (App. B, p. A-17.)

On February 16, 1983, the trustees of the Trust voted to deny the request to forgive the unpaid contributions. (App. B, p. A-17.) The Trust's decision meant that Rozay's would owe the Trust $76,133.29 in addition to liquidated damages and interest if Mr. Rozay signed the collective bargaining agreement. (App. B, p. A-19.) The Trust's decision completely transformed the collective bargaining agreement from an agreement tailored to help Rozay's survive its mounting economic difficulties by keeping its costs stable, into something completely different -- the

assumption of a $76,133.29 debt. (See App. F, p. A-75--A-76.)

On March 4, 1983, a Trust representative told Murrietta of the Trust's decision. (See App. B, p. A-18; App. F, p. A-74.) Although the Trust knew that waiver of the unpaid pension contributions was a critical issue for Rozay's, the Trust did not at that time inform Rozay's of the Trust's decision. Indeed, the Trust did not inform Rozay's of its decision until several weeks later in a letter dated March 24, 1983. (App. F, p. A-76--A-77.)

On March 8, 1983, Murrietta and Mr. Rozay met to execute the documents which confirmed the January 17, 1983 agreement. These documents included the side agreement resolving the grievance and NLRB unfair labor practice charge, the collective bargaining agreement, and the pension agreement. (App. B, p. A-18.) Although Murrietta knew that retroactive

pension contributions was the key issue for Mr. Rozay, he did not tell Mr. Rozay what he had learned four days earlier from the Trust -- that the nature of the agreement had been completely changed by the Trust's decision not to waive the unpaid pension contributions. (App. B, p. A-18.) Murrietta intentionally failed to advise Mr. Rozay of the Trust's decision because he knew that if Mr. Rozay was told that the unpaid contributions in excess of $75,000 would not be forgiven, Mr. Rozay would not have signed the three documents. (App. B, p. A-18.) In the district court's words:

> "At the very moment [Mr. Rozay] signed [the collective bargaining agreement], Murrietta knew very well indeed that the motivating reason for Mr. Rozay to go into this transaction had been negated, and he didn't tell him about it. Now if that is not fraud, then I have never seen it." (App. A, p. A-6.)

Given this fraud, the district court found that there was no meeting of the minds

between Rozay's and Teamsters Local 208 on the critical issue of retroactive pension contributions. (App. C, p. A-26.)

Mr. Rozay, assuming that unpaid contributions would be forgiven, signed the side agreement, the collective bargaining agreement, and the pension agreement. (App. B, p. A-18.) Teamsters Local 208 thereafter withdrew the NLRB unfair labor practice charge and the grievance. Subsequently, Southwest Administrators, Inc., filed this action against Rozay's to collect pension contributions for the period between May 1982 and February 1983.* The district court entered judgment in favor of the Trust on May 28, 1985 in the amount

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* The jurisdiction of the district court was invoked under Section 301(a) of the Labor Management Relations Act, 29 U.S.C. § 185 and Section 502 of the Employee Retirement Income Security Act, 29 U.S.C. § 1132.

of at least $122,789.03. (App. B, p. A-23; App. F, p. A-79.)

The district court was plainly bothered by the result and in a special status conference called to announce the decision, described Teamsters Local 208's conduct in the harshest terms:

> "Now if I have ever in my life seen a case of pure fraud it is this case.
>
> "Mr. Murrietta deliberately, willfully, and knowingly defrauded Mr. Rozay. There isn't the slightest doubt about it. . . .
>
> ". . . .
>
> "[I]t is a disgusting set of facts, and I am using the word 'disgusting' deliberately with very calm reflection.
>
> "I do not regard it as proper conduct on the part of a union to defraud an individual who is negotiating with them, and then have the trust fund take the benefit of it, and that is exactly what happened here.
>
> ". . . .
>
> "[T]he result I have reached is totally inequitable."

". . . .

"I feel this is one of the very few times when I feel really that I have done the wrong thing." (App. A, p. A-2--A-8.)

The Ninth Circuit affirmed. It held that an employer may raise a union's fraud as a defense to a trust fund's collection action only when the union's fraud has deceived the employer into believing that he is not signing a collective bargaining agreement but rather some other type of document. (App. E, p. A-47--A-48.) In reaching this result, the Ninth Circuit relied on case law which, for public policy reasons, restricts the availability of contract defenses which may be asserted by an employer in an ERISA trust fund collection action. (App. E, p. A-40--A-41.) The Ninth Circuit also relied on an analogy to traditional contract and negotiable instrument law where personal property or a negotiable instrument transferred by

virtue of a misrepresentation may be transferred to "innocent third parties who take in good faith and without notice of any defects in the chain of ownership." (App. E, p. A-46.) In these situations, the defrauded party can recover from the innocent third party "only if the initial transaction was 'void' rather than merely 'voidable.'" (App. E, p. A-46.)

Although the Ninth Circuit requested the parties discuss at oral argument the effect of the district court's decision in Rozay's v. Local 208 to void and rescind the 1981-1984 collective bargaining agreement, the decision below does not explain how a third party collection action may be based upon a contract which has been rendered null and void because of fraud. Nor does the decision below discuss this Court's decision in Kaiser Steel Corp. v. Mullins, 455 U.S. 72 (1982) which examines the defenses an employer may raise in only

defense to an ERISA trust fund collection action. Finally, the Ninth Circuit did not explain how the Trust was an "innocent" third party when the Trust tipped off Murrietta to inside information on March 4, 1983 and permitted the fraud to occur.

REASONS FOR GRANTING THE WRIT

I. THE NINTH CIRCUIT'S DECISION RAISES AN IMPORTANT QUESTION OF FEDERAL LABOR LAW WHICH SHOULD BE DECIDED BY THIS COURT: WHETHER AN ERISA TRUST FUND MAY COLLECT ON A RESCINDED AND VOID COLLECTIVE BARGAINING AGREEMENT PROCURED BY FRAUD WHICH WAS AIDED AND ABETTED BY THE TRUST.

The Ninth Circuit, as noted above, held that a union's fraud may be a defense to a trust fund's collection action in

one severely circumscribed fact situation -- when an employer is tricked into signing a collective bargaining agreement without knowing that the document is in fact a collective bargaining agreement. However, no case or statute so completely shields a trust fund so that it can, as in this case, take advantage of the blatantly fraudulent conduct of a union, fraud which the trust fund's actions allowed to occur in the first place. The importance of this issue can hardly be overstated. The purpose behind the statutory and case law which the Ninth Circuit relied upon is to protect the rights of pensioners and not to protect fraud. The Ninth Circuit, however, seriously misinterpreted ERISA so as to punish the victim of the fraud.

A. This Court Recognizes Employer Defenses To A Trust Fund's Suit For Delinquent Pension Contributions Which Question The Existence Of The Underlying Agreement And Which Are Related To The Disputed Pension Obligation.

In Kaiser Steel Corp. v. Mullins, 455 U.S. 72 (1982), this Court held that while the full range of the third party beneficiary doctrine does not apply to trust fund obligations arising from collective bargaining agreements, an employer, nevertheless, may raise core contract defenses to a trust fund's collection action which are related to the trust fund obligations. In Kaiser Steel, the employer's obligations to the trust fund were linked to whether or not it bought coal from producers under a union contract. When the trust fund sued for delinquent pension

contributions, the employer argued that the contract which provided for the contributions was void and unenforceable because it violated anti-trust laws and was an illegal hot cargo agreement. The Supreme Court accepted the employer's view and held that the employer was entitled to plead and have adjudicated its illegal contract defense. 455 U.S. at 87-88.

In so holding, the Supreme Court carefully examined the legislative history of Section 515 of ERISA, 29 U.S.C. § 1145

(1980).* The Supreme Court noted that the provision was enacted in order to simplify trust fund collection actions which in Congress' opinion had become unduly complicated and costly because of the extraneous defenses which employers often raised. However, the Supreme Court emphasized that Congress did not preclude all employer defenses:

> "The legislators did not say that employers should be prevented from raising all defenses; rather they spoke in terms of 'unrelated' and

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* Section 515 of ERISA provides:

> "Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement." (Emphasis added.)

Section 515 assumes a valid contractual obligation and, therefore, by its own terms would allow employer defenses which question the existence of the contract.

'extraneous' defenses." 455 U.S. at 88.*

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* During the Senate Committee on Labor and Human Resources debates concerning Section 515, the legislators approved of three cases in which courts disallowed "unrelated" defenses. Lewis v. Benedict Coal Corp., 361 U.S. 459 (1960) (rejecting employer's defense that the union had violated the no-strike clause in the collective bargaining agreement); Huge v. Long's Hauling Co., 590 F.2d 457 (3d Cir. 1978), cert. denied, 442 U.S. 918 (1979) (rejecting employer's particular anti-trust defense); Lewis v. Mill Ridge Coals, Inc., 298 F.2d 552, 556-57 (6th Cir. 1962) (rejecting employer's make-weight excuse for its failure to pay the pension contributions it had promised -- that the expected improvement of employer-employee relationships resulting from the trust agreement never came about because of the trustee's mismanagement and, therefore, there was a failure of consideration to the employer's promise to make pension contributions). In none of these cases, however, did the court give trust funds a blanket immunity from all contract defenses. See e.g., Lewis v. Mill Ridge Coals, Inc., 298 F.2d 552, 557 (6th Cir. 1962). In contrast to the present case, in each of these cases the employer's defense was neither directed to the existence of the contract nor related to the pension obligation. See Kaiser Steel Corp. v. Mullins, 455 U.S. 72 (1982) for a thorough discussion of the legislative history of Section 515.

Thus, the Supreme Court easily distinguished an earlier case, Lewis v. Benedict Coal Corp., 361 U.S. 459 (1960) because the conduct which the employer sought to raise as a defense in that case (the union's violation of the no-strike clause) was unrelated to the alleged pension contribution delinquencies.* 455 U.S. at 82-83.

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* In Benedict Coal, the employer, sued by a trust fund for delinquent pension contributions, argued that the union had violated the no-strike clause contained in the contract and sought to set-off any damages caused by the strike against the delinquent pension contributions. The Supreme Court rejected this argument, holding that the union's performance of its promises was not a condition precedent to the employer's duty to contribute to the trust fund. In the instant case, of course, the existence of a valid collective bargaining agreement is a condition precedent to Rozay's duty to make pension contributions.

B. The Ninth Circuit's Decision Represents A Severe Retrenchment Of This Court's Decision in Kaiser Steel Corp. v. Mullins, 455 U.S. 72 (1982).

The key question in the instant matter, as set forth by the Supreme Court in Kaiser Steel and by the legislative history of Section 515 of ERISA, is whether Rozay's defenses are "unrelated" or "extraneous" to the contract which purportedly requires the disputed pension contributions. Or put another way: is the instant dispute more analogous to Kaiser Steel (illegality defense) or to Benedict Coal (non-performance of a separate and independent obligation with the employer posed as a defense to making pension contributions to the trust fund.)

The Ninth Circuit, however, avoids this issue -- the relationship between

Teamsters Local 208's fraud and the contract requiring the disputed pension contributions. Instead, it relied upon an overly rigid (and improper) distinction between "fraud in the factum" and "fraud in the inducement." It improperly reduced Kaiser Steel to one single inquiry -- did the employer know he was signing a collective bargaining agreement? If the answer to that question is yes, then the Trust is

free to take full advantage of even the most "disgusting" fraud.*

The Ninth Circuit's simplistic fraud analysis will not withstand close scrutiny. Assume an employer and a union reach an agreement on a collective bargaining agreement with 10 cents per hour to be paid into a multi-employer pension trust fund. Assume further the union volunteers

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* In any event, Teamsters Local 208's fraud may be properly labelled "fraud in the factum." The district court, in Rozay's v. Local 208 noted that because of Teamsters Local 208's fraud, there was no meeting of the minds "on the essential, material, and critical issue of retroactive pension contributions." (App. F, p. A-83.) As the Restatement (Second) of Contracts notes:

> "If a misrepresentation as to the character or essential terms of a proposed contract induces conduct that appears to be a manifestation of assent by one who neither knows nor has reasonable opportunity to know of the character or essential terms of the proposed contract, his conduct is not effective as a manifestation of assent." Restatement (Second) of Contracts § 163 (1979) (emphasis added).

to prepare the agreement and changes the 10 cents per hour pension contribution to $1.00 per hour. The union presents the agreement and tells the employer there is no need to read it. The employer, then, signs the agreement. Under the Ninth Circuit's simplistic analysis, the trust fund can collect the $1.00 per hour contributions because the employer knew he was signing a collective bargaining agreement.

Had the Ninth Circuit made the analysis required by Kaiser Steel, it would have found that Rozay's contract defenses are neither extraneous nor unrelated to the duty to make pension contributions but rather deal explicitly and directly with the very contract which purportedly created the duty to make those pension contributions. Rozay's defense rests on whether the parties ever reached a contractually binding agreement. The district court explicitly found that the contract was a

product of fraud, that there was no meeting of the minds on the critical term of the contract, and that the fraud changed the essential nature and character of the agreement. This finding goes to the essence of the contractual relationship or more appropriately -- the lack of one. In fact, the fraud in this case involved the very pension contributions at the heart of the instant litigation.

C. The Ninth Circuit's Decision Undercuts Significant Public Policy Goals.

The decision below undercuts several significant public policy goals. To bind Rozay's to a contract to which it did not agree, runs counter to the whole thrust of American labor relations which is centered around the collective bargaining agreement as a mutually arrived at and bargained for

document. See, e.g., H.K. Porter Co. v. NLRB, 397 U.S. 99, 108 (1970) (freedom of contract is a fundamental policy of federal labor law); Genesco, Inc. v. Joint Council 13, United Shoe Workers, 341 F.2d 482, 486-89 (2d Cir. 1965) (union not bound by contract which it would not be considered to have made on ordinary principles of contract law).

Furthermore, while one goal of ERISA is to provide for the retirement security of employees, the Ninth Circuit's decision undercuts equally important ERISA public policy goals. Section 2(a) of ERISA, 29 U.S.C. § 1001(a), for example, recognizes that pension plans have become "an important factor affecting the stability of employment and the successful development of industrial relations," and that,

therefore, it was desirable to enact ERISA.* The impact of the Ninth Circuit's decision on industrial relations, however, can only be decidedly negative and counter-productive. The message to employers and unions is clear: A trust fund may take advantage of the most conspicuous fraud and bind an employer to a collective bargaining agreement to which the employer never validly consented and which no longer has any legal effect. Pension funding will suffer as employers become more wary of participating in multi-employer pension funds. Indeed, limiting the fraud defense to one severely limited factual setting, as does the decision below, will, because it increases the costs and risks

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* See, e.g., Fentron Indus., Inc. v. National Shopmen Pension Fund, 674 F.2d 1300, 1305 (9th Cir. 1982) (employer's impaired relationship with union is an injury within the "zone of interests" which Congress intended to protect when it enacted ERISA).

associated with pension trusts, jeopardize pension funding and encourage employers to divert funds from pensions toward other forms of compensation.

Not only does the Ninth Circuit's decision undercut ERISA public policy goals but it also rewards the Trust for breaching its fiduciary duty. In Kaiser Steel, the Supreme Court described the trust fund in the Benedict Coal case as an "innocent" third party who was, therefore, entitled to the public policy protections normally accorded ERISA trust funds. Kaiser Steel Corp., 455 U.S. at 83. The trust fund here can make no such claim of innocence. Trust funds have fiduciary duties not only to their beneficiaries and participants but also to their contributors. A trust fund cannot, as in this case, provide the union with critical inside information and fail to provide the employer with the same information and

then take advantage of the ensuing misunderstanding. Such selective dissemination of patently critical inside information is a clear breach of duty. Indeed, to allow the Trust to hide from its breach of duty behind the public policy rubric undercuts the other, equally important, public policy goals discussed above.

Lastly, the Ninth Circuit's retrenchment of Kaiser Steel will result in unnecessary and undesirable litigation. Deprived of the fraud defense except in the rarest of circumstances, the employer who is tricked into signing a pension agreement will have only two unappealing alternatives -- to abide by the fraudulent clause or to accept the expensive, double-barrelled burden of defending the lawsuit brought by the trust fund while prosecuting a second lawsuit against the defrauding party, which in many instances may be a potentially judgment-proof local union.

II. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH THE DECISIONS OF SEVERAL CIRCUITS AND DIRECTLY CONFLICTS WITH A DECISION OF THE SEVENTH CIRCUIT WHICH REQUIRES THE EXISTENCE OF A VALID WRITTEN AGREEMENT AS A PREREQUISITE TO AN ERISA TRUST FUND COLLECTION ACTION.

A. The Ninth Circuit's Decision Is Unique And Conflicts With Statutory And Case Law Which Requires Pension Contributions Only Pursuant To A Valid Written Agreement.

Except for the Ninth Circuit in the decision below, all other circuits which have considered the issue have concluded that an ERISA trust fund obligation can

only be created by a valid agreement between the employer and the union.*

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* See NLRB v. Amax Coal Co., 453 U.S. 322, 336-37, reh'g denied, 452 U.S. 950 (1981) (trustees operate under detailed written agreement, the product of bargaining between the employer and the union); Moglia v. Geoghegan 403 F.2d 110, 116 (2d Cir. 1968), cert. denied, 394 U.S. 919 (1969) ("Absent the written agreement, there is no valid [ERISA] trust as to those employer contributions. . . ."); Bugher v. Consolidated X-Ray Service Corp., 705 F.2d 1426, 1435 (5th Cir. 1983), cert. denied, __ U.S. __, 87 L. Ed. 2d 650, 105 S. Ct. 3524 (1985) (Courts will not enforce an illegal collective bargaining agreement provision which obligates an employer to contribute to an ERISA trust fund which is not based on a detailed written agreement); Carpenters Amended & Restated Health Benefit Fund v. Holleman Constr. Co., 751 F.2d 763, 770-71 (5th Cir. 1985) (Because the union and employer short form agreement terminated in 1975, employer did not assume obligations under new master collective bargaining agreement and, therefore, not liable for health and welfare benefit contributions.)

The Ninth Circuit, until the decision below, has always held that an employer is obligated to make benefit contributions to a trust fund only if it is a party to a binding collective bargaining agreement

(footnote continued on next page)

The rule that an employer's obligation to contribute to an ERISA trust fund can only arise by agreement between the union and the employer is, in part, statutory. Section 302 of the Labor Management Relations Act (the "LMRA"), 29 U.S.C. § 186, prohibits payments by employers to union representatives. Section 302(c)(5)(B) provides an exception for contributions to trust funds but requires that provision for such payments be specified

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(footnote continued from previous page) with the union. See, e.g., Carpenters Southern California Admin. Corp. v. Russell, 726 F.2d 1410, 1413 (9th Cir. 1984) (for employer to be obligated to make pension contributions, "there must exist a binding labor agreement between the Union and [Employer]. . . ."); Operating Eng'rs Pension Trust v. Gilliam, 737 F.2d 1501, 1503 (9th Cir. 1984) ("[Employer] is obligated to make benefit contributions to the Trust Funds only if he was party to a binding labor agreement with the union"). In the decision below, the Ninth Circuit offered no reason or explanation for departing from Russell and Gilliam.

in a written agreement.* See, e.g., Moglia v. Geoghegan, 403 F.2d 110, 116 (2d Cir. 1968), cert. denied, 394 U.S. 919 (1969) ("[T]he only employer contributions which may be accepted by the trustees administering the fund are those contributions from employers who have a written agreement with the union as required by subsection 302(c)(5)(B)").

An ERISA trust fund's status as a third party beneficiary,** also reinforces the necessity of a valid union-employer agreement. As a third party beneficiary, an ERISA trust fund's rights

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* Congress enacted Section 302 because of concerns about union corruption and alleged "shake-down" and "kick-back" schemes involving union pension funds. See Operating Eng'rs Pension Trust v. Gilliam, 737 F.2d 1501, 1505 (9th Cir. 1984).

** See, e.g., Kaiser Steel Corp., 455 U.S. at 83 n.8 (1982). (Quoting the Court of Appeals, "([T]hird-party beneficiaries, like the Trustees here, are subject to the contract defenses of nonperforming promisors.")

and obligations are defined and created by agreement between the two contracting parties, i.e., the union and the employer. Absent such an agreement, there is no third party beneficiary. See 2 Williston on Contracts § 347, at 796 (3d ed. 1959) ("Before any question as to the rights of third party beneficiaries can arise, it must be established that the agreement between the parties contains all the elements of an enforceable contract").

Contrary to this established authority requiring a valid written agreement, the Ninth Circuit, without any explanation whatsoever, allowed the Trust to maintain a collection action even though the collective bargaining agreement upon which

the action was based was declared null and void.*

B. The Ninth Circuit's Rejection Of The No "Meeting Of The Minds" Defense Conflicts With A Decision Of The Seventh Circuit.

In the present case, Rozay's argued that the underlying contract was invalid because there was no "meeting of the minds" on the critical issue of

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* The Ninth Circuit in the decision below acknowledged the district court's rescission of the collective bargaining agreement in Rozay's v. Local 208 but, nonetheless, offered no explanation as to how the Trust could maintain its action despite the lack of a valid written agreement. The fact that the actual order rescinding the contract occurred after the Southwest Administrators case was appealed should not matter. The Trust by successfully opposing Rozay's motion to file a third party complaint against Teamsters Local 208 prevented Teamsters Local 208 from becoming a party. Thus, the trial court could not rescind the collective bargaining agreement.

retroactive pension contributions and, therefore, no valid contract. As noted above, absent a valid underlying collective bargaining agreement, there is no trust fund obligation.

Two Courts of Appeals have now faced this precise question -- whether a lack of a meeting of the minds on the underlying union-employer contract may be asserted by an employer as a defense to an ERISA trust fund's third party claim. In the instant case, the Ninth Circuit held that the fact that the parties had no understanding or agreement on the key issue of pension contributions was irrelevant, and that even the district court's rescission of the underlying collective bargaining agreement in Rozay's v. Local 208 because of the pervasive effect of the union's fraud did not affect the Trust's claim. In Caporale v. Mar Les, Inc., 656 F.2d 242 (7th Cir.

1981), the Seventh Circuit faced a similar issue and reached the opposite result.

In Caporale, the employer signed two memoranda of agreement which incorporated by reference a collective bargaining agreement. The memoranda specifically noted that the employer agreed to be bound by the collective bargaining agreement and agreed to pay to a trust fund the amounts stated in the collective bargaining agreement. Id. at 243. The employer never received an executed copy of the memoranda nor a copy of the collective bargaining agreement. Id. at 243. While the employer believed he had, by signing the memoranda, obligated himself to pay pension contributions for only one employee, the collective bargaining agreements set forth a schedule of contributions for all employees. Id. at 245. When sued by the trust fund for delinquent contributions, the employer denied entering into such an

agreement and further denied that any pension contributions were due.

The Seventh Circuit agreed with the employer:

> "While the agreement may have created some limited contractual relationship between the parties, it did not bind the defendant to a collective bargaining agreement that was never conveyed to the defendant. There was never mutual assent to the terms sought by the plaintiffs." 656 F.2d at 245.

The Seventh Circuit then noted that the conclusion that there was no contract because of a lack of a meeting of the minds disposed of the trust fund's claim.* Id. at 245. Thus, the Seventh Circuit, consistent with LMRA Section 302 and with an ERISA trust fund's third party beneficiary status, held that a no meeting of

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* The Seventh Circuit went on to note that even if the memoranda did bind the parties to the collective bargaining agreement, that agreement expired prior to the period for which the trust fund claimed benefits. 656 F.2d at 245.

the minds defense is a proper defense to an ERISA trust fund's collection action.

In Southwest Administrators, as in Caporale, the district court found that the 1981-1984 collective bargaining agreement was from the outset fatally flawed -- because of Teamsters Local 208's fraud there was no meeting of the minds as to an essential term. (App. C, p. A-26; App. F, p. A-75--A-76, A-83.) Indeed, the instant case presents a much stronger argument in favor of the no meeting of the minds defense because here the misunderstanding was the result of the union's intentional fraudulent misconduct. Moreover, the district court, in Rozay's v. Local 208, even concluded that the union's fraud was so critical that it transformed the document which Mr. Rozay believed he was signing -- an agreement to help Rozay's through difficult economic times -- into something altogether different -- a debt of over

$75,000. Accordingly, the district court rescinded and voided the agreement. (App. F, p. A-83--A-84.) Yet despite these facts and in contrast to Caporale, Section 302, and traditional third party beneficiary principles, the Ninth Circuit held that a Trust may base its collection action on a void collective bargaining agreement to which there was no meeting of the minds and which has been rescinded.

III. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH A DECISION OF THE SIXTH CIRCUIT WHICH GIVES EFFECT TO A SIDE AGREEMENT LIMITING AN EMPLOYER'S PENSION OBLIGATION.

In the district court and on appeal, Rozay's argued that the side agreement executed simultaneously with the collective bargaining agreement served as an "accord and satisfaction," resolving the dispute

over the unpaid pension contributions. The side agreement required Teamsters Local 208 to drop its unfair labor practice charge and grievance regarding pension contributions but did not require Rozay's to make the disputed pension contributions. The side agreement also expressly stated that it resolved "all" disputes between the parties arising out of the unfair labor practice charge and grievance. The issue of unpaid pension contributions was central to the unfair labor practice charge and the only issue posed by Teamsters Local 208's grievance. (App. B, p. A-15.) Thus, when the side agreement says it resolves all disputes, it means all disputes including the issue of the unpaid pension contributions.

The Ninth Circuit rejected this argument noting that the side agreement would "at most" relieve Rozay's of the obligation to "pay the delinquent contributions

as part of the resolution of the unfair labor practice charge and the grievance."* (App. E, p. A-53.) The Ninth Circuit, however, then concluded that despite this possible (and logical) interpretation of the side agreement, the "independent force of the separately adopted collective bargaining agreement still requires Rozay's Transfer to pay the delinquent contributions." (App. E, p. A-53--A-54.)

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* The Ninth Circuit also emphasized that while the side agreement specifically listed several modifications of the collective bargaining agreement, it did not alter the effective dates of the agreement -- September 1, 1981 through September 30, 1984 -- and the effective dates of the pension obligation. (App. E, p. A-53.) This argument, however, overlooks two salient points. First, the side agreement resolved the unpaid pension contribution issue by not specifically requiring payment of the disputed contributions as part of the settlement. Neither the Trust nor Local 208 argues the settlement required the payment of the retroactive pension contributions. Second, while the collective bargaining agreement has an effective date of September 1, 1981, that fact alone does not mean that pension contributions were <u>required</u> from that date forward.

The Ninth Circuit's emphasis of the "independent force" of the "separately adopted" collective bargaining agreement, however, conflicts with a recent en banc decision of the Sixth Circuit, Central States Southeast and Southwest Areas Pension Fund v. Kraftco, Inc., 799 F.2d 1098 (6th Cir. 1986). In Central States, the union and the company signed a side agreement the same day it signed the collective bargaining agreement. While the collective bargaining agreement provided that the company would make pension contributions for regular employees who started work, the side agreement provided that the company would make payments only for employees who had been with the company for 36 months. Subsequently, the trust fund sued the company for delinquent pension contributions allegedly due employees for their initial 36 months. On appeal, the Sixth Circuit concluded that the side

agreement was an effective modification of the collective bargaining agreement.

The Sixth Circuit, in particular, noted that LMRA Section 302 did not bar the side agreement; it bars only transfers of value from employers to unions:

> "The side letter in this case is either an agreement not to pay money or an agreement limiting a preexisting valid obligation to pay money. The side letter did not implicate the transfer of anything of value from the employer to the union . . . . Accordingly, since this is not the type of case congress intended to reach in enacting section 302, section 302 is not applicable to this case." 799 F.2d at 1111.

Additionally, the Sixth Circuit noted that even if LMRA Section 302 were applicable, the written agreement requirements of LMRA Section 302(c)(5)'s exception are met by the side agreement when construed with the collective bargaining agreement.

The same factual setting exists here, yet the Ninth Circuit reached the opposite result. Here, as in Central States, LMRA Section 302 does not apply to the side

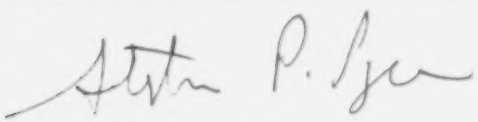
agreement; it does not "implicate the transfer of anything of value from the employer to the union." As in Central States, it is, at most, an agreement limiting a pre-existing valid obligation to pay money. Furthermore, even if LMRA Section 302 were applicable, the Ninth Circuit should have construed the collective bargaining agreement with the side agreement so as to limit pension contributions rather than rely on the "separately adopted" collective bargaining agreement's "independent force." The collective bargaining agreement and the side letter were adopted as one package since they memorialized the parties' agreement. That agreement provided only for prospective pension contributions.

CONCLUSION

For all of the foregoing reasons, Rozay's respectfully submits that this case presents a substantial federal question for this Court's review, that the decision below conflicts with other circuit authority, and that, accordingly, this Court should grant the petition for a writ of certiorari.

DATED: November 21, 1986.

Respectfully submitted,



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Appendix A

In the United States
District Court
For The Central District
Of California

Before the
Honorable Mariana R. Pfaelzer, Judge

No. CV-83-4194 MRP

SOUTHWEST ADMINISTRATORS, INC.,
Plaintiff,

vs.

ROZAY'S TRANSFER,
Defendant.

Los Angeles, California
Friday, May 24, 1985
1:30 p.m.

REPORTER'S TRANSCRIPT OF
PROCEEDINGS

THE CLERK: Item No. 4, Civil 83-4194, Southwest Administrators, Inc. versus Rozay's Transfer.

Counsel, please make your appearances.

MR. PEPE: Good afternoon, your Honor. Stephen Pepe and Cliff Fonstein on behalf of defendant Rozay's Transfer.

MS. WALDECK: Patricia Waldeck of Pappy, Kaplon, Vogel & Phillips for plaintiff.

THE COURT: All right. Now sit down for just a minute. I want to talk to you.

Now we are going up against a body of established law, in my opinion, that makes these defenses that can be raised against a trust fund very difficult to deal with.

Now if I have ever in my life seen a case of pure fraud it is this case.

Mr. Murrietta deliberately, willfully, and knowingly defrauded Mr. Rozay. There isn't the slightest doubt about it. The reason I had you come here is that I wanted to say that on the record. I have said that in the findings. I did not believe the testimony of Mr. Murrietta.

I do not believe that Mr. Anderson from the evidence before me did anything wrong, but I have never in my life seen a situation which was clearer in terms of fraudulent conduct than this situation with respect to Mr. Murrietta.

Now that being the case, I made a finding that there was fraud and then I on more one occasion have gone through all of the cases and I cannot find that under the law of the Ninth Circuit that that gives a defense to Mr. Rozay against the trust fund. Now I do believe that what must be done immediately is that there has to be some consideration given to an action brought against Mr. Murrietta and the union and if you believe that there is any other finding that should be made to make more clear what I am now saying, I am perfectly prepared to have you come back and make an application for it.

I would have found for Mr. Rozay if there was any way for me to do it. I am totally and absolutely disgusted with the behavior in this case, but I believe that my hands are tied.

Now what did I do besides reading all the cases myself? Well, I had my clerk read all of the cases without telling my clerk what conclusion to reach. I just told the clerk what I had found and said, "Now what do you see from looking at all of the cases?" And the result was the same. Then I reread all the cases again. Now I don't think that the contract is ambiguous. If there has ever been a situation where it doesn't appear that there was any meeting of the minds, this is it. There is no question about it. There is no doubt about the fact that Mr. Rozay knew he was signing a collective bargaining agreement, and under the cases that I had in front of me, it doesn't seem to me

I have any choice but to follow the cases that are in the Ninth Circuit.

If I were the trust fund knowing that that was the feeling of the Court I would come to an accommodation about this because it is a disgusting set of facts, and I am using the word "disgusting" deliberately with very calm reflection.

I do not regard it as proper conduct on the part of a union to defraud an individual who is negotiating with them, and then to have the trust fund take the benefit of it, and that is exactly what happened here.

Now is I have made myself clear that is all I have to say.

MR. PEPE: Thank you, your Honor. We appreciate your comments.

THE COURT: It is the most unfair conduct I have ever seen.

MR. PEPE: We agree with you, your Honor.

THE COURT: You just can't conceive of a situation where a trust fund should get the benefit of that kind of conduct, but under the Ninth Circuit case law, I think the trust fund does not -- or you can't assert against the trust fund a defense such as this. He knew that it was a collective bargaining agreement. He went into it not knowing what he was doing; that is to say, he was assuming that the facts were other than what they actually were. At the very moment he signed it, Murrietta knew very well indeed that the motivating reason for Mr. Rozay to go into this transaction had been negated, and he didn't tell him about it. Now if that is not fraud, then I have never seen it.

All right. So now you have the findings and the judgment. The reason I am having you in here is that if there is anything that you think that I should do to add to the findings, I am prepared to

do that if I reasonably can because the result I have reached is totally inequitable. It is the wrong result on this set of facts, but I think I am bound by this case.

MR. PEPE: I appreciate your comments, you Honor. We will take a look at the findings over the weekend and we will see if we want anything additional.

THE COURT: I don't believe Anderson did anything wrong at all. I think he did everything he was supposed to, even though he wasn't here to testify. I thought about that a great deal, and I don't know what would have happened if he had been the one who had gone over there or if he had been present at the time. I doubt that he would have let that happen.

MR. PEPE: I think that is correct, your Honor.

THE COURT: Thank you.

MR. PEPE: Thank you, your Honor.

THE COURT: Incidentally, Ms. Waldeck, this is no reflection on you as a lawyer or on the trust fund. Do you understand that?

MS. WALDECK: Yes.

THE COURT: I have to make this clear on the record because I feel this is one of the very few times when I feel really that I have done the wrong thing. Thank you.

MR. PEPE: Thank you, your Honor.

MR. ROZAY: Thank you.

(Proceedings concluded.)

C E R T I F I C A T E

I HEREBY CERTIFY THAT THE FOREGOING IS A TRUE AND CORRECT TRANSCRIPT FROM THE STENOGRAPHIC RECORD OF PROCEEDINGS IN THE FOREGOING MATTER.

/s/ Beth E. Culbertson — July 19, 1985
BETH E. CULBERTSON, CSR — DATE

Appendix B

United States District Court

Central District Of California

Case No. CV-83-4194 MRP

SOUTHWEST ADMINISTRATORS, INC.,

Plaintiff,

vs.

ROZAY'S TRANSFER, a California

Corporation,

Defendant.

FINDINGS OF FACT AND

CONCLUSIONS OF LAW

[Filed May 23, 1985]

The above-entitled cause came on regularly for trial on March 22, 1985 before the Honorable Mariana R. Pfaelzer, United States District Judge, sitting without a jury. Patricia S. Waldeck, of the law firm of Pappy, Kaplon, Vogel & Phillips appeared as counsel for plaintiff, and Joel M. Grossman, of the law firm of O'Melveny & Myers, appeared as counsel for defendant. The trial was conducted pursuant to the Pretrial Conference Order, the testimony and documentary evidence introduced at trial, and the oral arguments of counsel. The cause having been submitted to the Court for decision, the Court now makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. The Plaintiff Southwest Administrators, Inc. is the assignee of and the

authorized administrative agency for the Western Conference of Teamsters Pension Trust Fund ("the Trust Fund").

2. The Trust Fund is an employee pension benefit plan within the meaning of the Employee Retirement Income Security Act.

3. Defendant Rozay's Transfer ("Rozay's") is a California corporation engaged in the trucking industry in Southern California.

4. The truck drivers and dock workers employed by Rozay's are now and for several years have been represented for purposes of collective bargaining by Local Freight Drivers Union, Local 208, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America ("Local 208").

5. Rozay's and Local 208 were party to a collective bargaining agreement ("Agreement") and an Employer-Union

Pension Certification ("Certification") which expired on September 30, 1981.

6. The Agreement and Certification which expired on September 30, 1981 required Rozay's to make contributions to the Trust Fund on behalf of employees represented by Local 208.

7. Rozay's made regular contributions to the Trust Fund during the life of the Agreement and Certification and continued to make contributions after the expiration and through April 1982, while Local 208 and Rozay's attempted to negotiate a renewal Agreement and Certification.

8. On or about April 18, 1982, Local 208 presented a rough draft of a new collective bargaining agreement to Rozay's. After reviewing the draft, on May 6, 1982, Rozay's returned it unsigned to Local 208 with several corrections.

9. Also on May 6, 1982, Rozay's Vice President, Richard Fletcher ("Fletcher"),

advised Local 208 Business Agent, Eddie McKiernan ("McKiernan"), of Rozay's severe economic problems and explained that in order to stay in business, Rozay's would need a reduction in labor costs. Rozay's specifically proposed cessation of pension contributions and reduced holiday, vacation and sick leave benefits.

10. On April 26, 1982, the Trust Fund wrote to Rozay's and informed Rozay's that it could not accept pension contributions unless there was a signed collective bargaining agreement in force between Rozay's and Local 208. On June 30, 1982, the Trust wrote another substantially similar letter to Rozay's.

11. On June 8, 1982, Fletcher again raised the need for concessions with McKiernan and with Local 208's Secretary-Treasurer, Alex Maheras ("Maharas") [sic]. Maheras requested that Rozay's make the proposal in the form of a letter.

12. On June 11, 1982, Fletcher on behalf of Rozay's wrote to Maheras to propose labor concessions. Specifically, Fletcher proposed the following: cessation of pension contributions; elimination of one week's vacation; elimination of two personal holidays; and elimination of five days' sick leave. This letter was sent via certified mail.

13. Local 208 received the letter of June 11, 1982, but made no reply.

14. On June 28, 1982, on behalf of Rozay's, Fletcher sent a second letter of Local 208. Fletcher stated that having received no response to its June 11, 1982 letter, Rozay's assumed that the union had no objections to its proposed changes, and the changes would be implemented on July 6, 1982. This second letter was also sent by certified mail.

15. Local 208 received Rozay's letter of June 28, 1982, but made no reply.

16. Rozay's implemented the proposals outlined in its June 11, 1982 letter to Local 208 effective July 6, 1982.

17. Several months after Rozay's ceased making pension contributions to the Trust Fund, Local 208 filed an unfair labor practice charge with the National Labor Relations Board (the "Board" or "NLRB"). The charge was filed in September 1982 and amended in November 1982 under Board Case No. 21-CA-21591. Local 208 also filed a grievance pursuant to the grievance and arbitration provisions of the expired Agreement. The Board charge alleged that the cessation of the payment of pension contributions constituted an unfair labor practice, and the grievance alleged that it was a breach of the collective bargaining agreement.

18. On January 17, 1983, William S. Rozay ("Rozay"), President of Rozay's, met with Maurice E. Anderson ("Anderson"),

International Vice President of the International Brotherhood of Teamsters, and Local 208 President Archie Murrietta ("Murrietta"). The purpose of this meeting was to resolve the NLRB case then pending between Rozay's and Local 208. This meeting took place in Anderson's office.

19. At the January 17, 1983 meeting, Rozay's and Local 208 reached a settlement of the NLRB case. Among the terms agreed to were reduction of hourly wages by $1.00 per hour and resumption of payment of pension contributions prospectively.

20. At this January 17, 1983 meeting, Anderson agreed to ask the Trust Fund to waive retroactive pension contributions for the period May 1982 to February 1983. He represented to Rozay that the Trust Fund had forgiven the unpaid pension contributions of other employers under similar circumstances.

21. On January 21, 1983, Rozay sent Murrietta a letter confirming the terms of the January 17, 1983 agreement. Rozay stated in his letter that under the agreement, retroactive contributions would not be required. On January 26, 1983, Murrietta replied to Rozay's letter, and did not disagree with this statement in any way.

22. On January 26, 1983, Murrietta wrote a letter to the Trust Fund requesting that Rozay's be relieved from paying pension contributions for the months of July 1982 through January 1983. He sent a copy of this letter to Rozay.

23. On February 16, 1983, the Trustees of the Trust Fund met to consider, among other agenda items, whether to forgive Rozay's unpaid pension contributions for the months of May 1982 through February 1983. The Trustees voted not to forgive the payment of these contributions.

24. On March 8, 1983, Local 208 and Rozay's executed a collective bargaining agreement, an Employer-Union Pension Certification, and a settlement agreement (the "Side Agreement") which resolved all pending disputes between Rozay's and Local 208 involving the Board charge and the grievance.

25. At the time that Murrietta and Rozay signed the March 8, 1983 collective bargaining agreement, Murrietta knew that the Trust had voted not to forgive Rozay's unpaid contributions, but he did not disclose this fact to Rozay. Murrietta did not disclose this fact to Rozay because he knew that if Rozay was told that the past contributions would not be forgiven, Rozay would not execute the collective bargaining agreement. Murrietta fraudulently induced Rozay's execution of the collective bargaining agreement.

26. Anderson made no fraudulent representations of any kind to Rozay nor did he fraudulently fail to disclose any fact or facts to Rozay at any time.

27. Since executing the renewal collective bargaining agreement and the Employer-Union Pension Certification, Rozay's has made regular contributions to the Trust Fund; however, Rozay's has not made payment to the Trust Fund for the period of May 1982 through January 1983. The parties are in agreement that the sum due to the Trust Fund for this period is $76,133.29 in pension contributions.

28. Article IV of the Agreement and Declaration of Trust of the Trust Fund provides that delinquent employers shall pay to the Trust Fund liquidated damages of 20% of the sum due in contributions, interest at the variable annual rates established by the Trustees, and reasonable attorneys' fees. The liquidated damages

due are $15,226.65, and the interest due as of March 24, 1985 is $25,039.09.

CONCLUSIONS OF LAW

1. The collective bargaining agreement and Employer-Union Pension Certification which were executed on March 8, 1983 by Rozay's and Local 208 expressly required that Rozay's make contributions to the Trust Fund for the period September 1, 1981 through September 30, 1984, which includes the period disputed here, May 1982 to February 1983. The contract is not ambiguous on this point.

2. The fact that Rozay's was fraudulently induced by Murrietta of Local 208 into entering into an agreement which required him to make retroactive pension contributions is not a defense against the Trust Fund. Southern California Retail Clerks Union and Food Employers Joint Pension Trust Fund v. Bjorklund, 728 F.2d

1262 (9th Cir. 1984) (fraudulent inducement by union no defense to trust fund collection action against employer). Murrietta's oral misrepresentations, and the understandings of Rozay's based thereon, do not qualify the language of the written agreement. Kemmis v. McGoldrick, 706 F.2d 993 (9th Cir. 1983) (oral understandings not to be considered in interpreting collective bargaining agreement terms regarding contributions to employee benefit plans). See also Labor-Management Relations Act § 302(c)(5), 29 U.S.C. § 186 (requiring written agreement setting out "detailed basis" on which employer contributions to employee pension funds are to be made).

3. Murrietta and other representatives of the union did not act as agents of the Trust Fund in negotiating the collective bargaining agreement with Rozay's. The fraud was therefore not committed by

the Trust Fund although the Trust Fund benefitted from it.

4. Even assuming arguendo that the Side Agreement executed March 8, 1983 constituted an accord and satisfaction as to the issues raised in the NLRB charge, the Side Agreement is not a bar to defendant's liability for retroactive payments. The language of the renewed collective bargaining agreement, executed at the same time, clearly states that the retroactive payments are to be made. The Side Agreement was entered into based on the terms in the collective bargaining agreement. Therefore, the retroactive payments provided for in the collective bargaining agreement would be part of any accord and satisfaction.

5. By failing to make retroactive payments to the Trust Fund for the period May 1982 to February 1983, Rozay's is in breach of the collective bargaining

agreement. It is liable for retroactive contributions in the amount of $76,133.29, as well as liquidated damages of $15,226.65, interest in the amount of $25,039.09, and reasonable attorneys' fees, as provided by the terms of the Agreement and Declaration of Trust of the Trust Fund.

DATED: May 22, 1985

/s/ Mariana R. Pfaelzer
MARIANA R. PFAELZER
United States
District Judge

Appendix C

United States District Court

Central District Of California

Case No. CV-83-4194 MRP

SOUTHWEST ADMINISTRATORS, INC.,

Plaintiff,

vs.

ROZAY'S TRANSFER, a California

Corporation,

Defendant.

APPLICATION TO AMEND AND

SUPPLEMENT FINDINGS OF FACT

AND CONCLUSIONS OF LAW

[Filed June 3, 1985]

Pursuant to the Court's suggestion on Friday, May 24, 1985, defendant Rozay's Transfer hereby applies to the Court to amend and supplement its Findings of Fact and Conclusions of Law, heretofore filed, in the following particulars:

1. Amend Finding of Fact No. 18 by adding the following sentence:

> "At all times during his dealings with Rozay's, Murrietta were acting as agent of and on behalf of Local 208."

2. Amend Finding of Fact No. 25 by adding the following sentence:

> "When he committed these fraudulent acts, Murrietta was acting as an agent of and on behalf of Local 208."

3. Make the following additional Finding of Fact:

> "At the time that Murrietta and Rozay signed the March 8, 1983 collective bargaining agreement, the Employer-Union Pension Certification

and the Side Agreement, there was no meeting of the minds between Rozay's and Local 208 on the issue of retroactive pension contributions."

4. Amend Conclusion of Law No. 3 by adding the following sentences:

"When he committed the fraud, Murrietta was acting as an agent of and on behalf of Local 208. At the time that Murrietta and Rozay signed the March 8, 1983 collective bargaining agreement, the Employer-Union Pension Certification and the Side Agreement, there was no meeting of the minds between Rozay's and Local 208 on the issue of retroactive pension contributions."

5. Amend the first paragraph of the Finding of Fact and Conclusions of Law to read:

"Stephen P. Pepe and Cliff Fonstein, of the law firm of

O'Melveny & Myers, appeared as counsel for defendant."

Dated: May 31, 1985.

Respectfully Submitted,

O'MELVENY & MYERS
STEPHEN P. PEPE
CLIFF FONSTEIN

By /s/ Cliff Fonstein
Cliff Fonstein
Attorneys for Defendant
Rozay's Transfer

O R D E R

IT IS SO ORDERED.

DATED: June 3, 1985.

MARIANA R. PFAELZER
U.S. District Court Judge

Appendix D

United States District Court

Central District Of California

Case No. CV-83-8313 MRP

ROZAY'S TRANSFER,

Plaintiff,

vs.

LOCAL FREIGHT DRIVERS,

LOCAL 208, et al.

Defendants.

MINUTE ORDER

[Dated January 30, 1986]

PROCEEDINGS:

Court orders judgment for Rozay's for recission and indemnification. No attorneys' fees, no punitive damages. Counsel for plaintiff to submit proposed findings and conclusions by February 10, 1986.

cc:

Cliff Fonstein
O'Melveny & Myers
400 S. Hope Street
Los Angeles, California 90071

Robert D. Vogel
Wohlner, Kaplon, Phillips,
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1545 Wilshire Blvd.
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L. A., Ca. 90017

Appendix E

United States Court of Appeals

For the Ninth Circuit

Nos. 84-5689/85-6020

D. C. No. CV-83-4194 MRP (Bx)

SOUTHWEST ADMINISTRATORS, INC.,

Plaintiff/Appellee,

vs.

ROZAY'S TRANSFER, a California Corporation,

Defendant/Appellant.

OPINION

[Filed June 10, 1986]

Before: Wallace, Pregerson, and Beezer, Circuit Judges.

Beezer, Circuit Judge:

Southwest Administrators, Inc., an employee benefit trust fund administrator, brought this action against Rozay's Transfer, an employer, to recover allegedly delinquent trust fund contributions. Rozay's Transfer contends Teamsters Local 208 fraudulently induced it to execute the underlying collective bargaining agreement and thus Rozay's Transfer has no obligation to pay retroactive contributions. The district court concluded that sections 502(a) and 515 of the Employee Retirement Income Security Act, 29 U.S.C. §§ 1132(a), 1145, do not permit such a defense to nonpayment. We affirm.

I

BACKGROUND

Prior to September 30, 1981, Rozay's Transfer, an employer in the trucking

industry, and Teamsters Local 208 were parties to a collective bargaining agreement. Pursuant to the agreement, Rozay's Transfer made monthly contributions on behalf of its employees to the Western Conference of Teamsters Pension Trust Fund. This trust fund is a multiemployer pension plan as defined by subsections 3(2) and (37)(A) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1002(2), (37)(A).

After the agreement had expired, and while negotiations were continuing over the terms of a successor agreement, Rozay's Transfer continued to make contributions to the trust fund pursuant to the terms of the 1978-81 bargaining agreement. In July, 1982, when no successor agreement had yet been adopted, Rozay's Transfer informed the union that it had ceased making contributions to the pension fund.

In September, 1982, Local 208 filed an unfair labor practice claim with the National Labor Relations Board (NLRB) charging Rozay's Transfer under 29 U.S.C. § 158(a)(5) with refusal to execute a collective bargaining agreement that had allegedly been negotiated. The NLRB charge was subsequently amended to include the charge that Rozay's Transfer had unilaterally altered benefits and conditions of employment, including cessation of payments to the pension fund. Local 208 also filed a grievance alleging the cessation of contributions to the trust fund violated the collective bargaining agreement.

While the NLRB charge and the grievance were pending, William S. Rozay, the owner of Rozay's Transfer, and Archie Murrietta, president of Local 208, eventually reached a settlement. Under this settlement, employee wages would be reduced by $1.00 and Rozay's Transfer would

resume payments to the trust fund on behalf of each employee at the approximate rate of $.99 per hour.

In light of the company's precarious financial position, Rozay expressed serious concerns about being required to make retroactive pension fund contributions for the period between May, 1982 and February, 1983. Murrietta, and Maurice E. Anderson, the director of the Western Conference of Teamsters, agreed to contact the trust fund and request a waiver of the obligation to make contributions for this

period.* Murrietta and Anderson assured Rozay that the delinquent payments would be forgiven, noting that the trust fund had waived the unpaid pension contributions of other employers under similar circumstances.

Murrietta wrote to the trust fund on behalf of Rozay's Transfer requesting relief from payment of contributions for this interim period. However, on

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* Apparently the parties believed it was not possible simply to draft a collective bargaining agreement providing for prospective-only payment of contributions to the pension fund. It was the established policy of the Western Conference of Teamsters Pension Trust Fund not to accept contributions made under any collective bargaining agreement which provided for a "gap" in contributions. Thus, when a collective bargaining agreement expired, in order for the employer to be reinstated in the trust fund, the new agreement had to provide for the payment of contributions for the interim between the two agreements.

However, Murrietta and Anderson represented to Rozay that it was possible on an individual case-by-case basis for the trust fund to grant an employer relief from making up the delinquent payments.

February 16, 1983, the trustees of the Western Conference of Teamsters Pension Fund, voted to deny the request to forgive the unpaid contributions.

When the new collective bargaining agreement was executed on March 8, 1983, Murrietta had been informed of the trust fund's decision to deny a waiver of the delinquent contributions. He did not advise Rozay of this action. Rozay, assuming that unpaid contributions would be forgiven, signed the agreement, which covered the period from September 1, 1981 to September 30, 1984. The parties also executed a settlement agreement resolving the NLRB unfair practice complaint and the breach of agreement grievance. Local 208 thereafter withdrew the NLRB unfair labor practice charge and the grievance.

Subsequently, Southwest Administrators, Inc., the assignee of the Western Conference of Teamsters Pension Trust

Fund, filed this action against Rozay's Transfer under sections 502(a) and 515 of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1132(a), 1145, to collect delinquent contributions for the period between May, 1982 and February, 1983.

Rozay's Transfer contended that its obligation to make pension fund contributions dated only from March 8, 1983, when the collective bargaining agreement was signed. Rozay's Transfer also filed a counterclaim seeking the return of $57,235.28 in contributions made to the trust between October, 1981 and April, 1982, the period between expiration of the old bargaining agreement and the date Rozay's Transfer ceased making payments.

The district court denied cross-motions for summary judgment on Southwest Administrators' complaint to collect delinquent contributions. However, the

court did grant summary judgment against Rozay's Transfer on the counter-claim to recover contributions paid after the expiration of the old agreement.*

After a one day bench trial, the district court held that the trust fund's right to enforce the express terms of the collective bargaining agreement, requiring pension fund contributions for the contested period, was not impaired by the union official's oral misrepresentations. The district court did find that Rozay had been "fraudulently induced" by Murrietta to sign the collective bargaining agreement, and that there had been no "meeting of the minds" on issue of the retroactive

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* Rozay's Transfer appeal from that summary judgment was stayed by this court pending final judgment by the district court on the primary claim in the case. That appeal has now been consolidated with Rozay's Transfer's appeal from final judgment in favor of Southwest Administrators in the collection action.

pension fund contributions. However, as the fraud was not committed by the trust fund, the court held it was not precluded from enforcing Rozay's Transfer's obligation to make contributions as required by the express terms of the bargaining agreement.

The district court entered judgment for Southwest Administrators in the amounts of $76,133.29 in retroactive pension fund contributions, $15,226.25 in liquidated damages, $25,039.09 in interest, and $6,390.00 in attorneys fees.

II

STANDARD OF REVIEW

We accept the district court's findings of fact because they are not clearly erroneous. See Operating Engineers Pension Trust v. Gilliam, 737 F.2d 1501, 1502 (9th Cir. 1984).

Whether certain contract defenses are available in an action to recover delinquent trust fund contributions is a question of law. We review de novo a district court's conclusions of law. Maxwell v. Lucky Construction Co., Inc., 710 F.2d 1395, 1397 (9th Cir. 1983).

III

AVAILABILITY OF CONTRACT DEFENSES IN PENSION FUND COLLECTION ACTION

For an employer to be obligated to make employee benefit contributions to a trust fund, there must exist a binding collective bargaining agreement. See Carpenters Southern California Administrative Corp. v. Russell, 726 F.2d 1410, 1413 (9th Cir. 1984). Rozay's Transfer contends its bargaining agreement is invalid, because it was the product of fraudulent inducement.

In an action to recover delinquent contributions, the trust fund stands in the position of a third-party beneficiary of the collective bargaining agreement. A third-party beneficiary's rights are generally subject to any contract defense which the promisor could assert against the promisee if the promisee were suing on the contract. J. Calamari & J. Perillo, The Law of Contracts, § 17-8, at 623-24 (2d ed. 1977).

However, a collective bargaining agreement is not a typical third-party beneficiary contract. See Lewis v. Benedict Coal Corp., 361 U.S. 459, 468 (1960). For reasons of public policy, traditional contract law does not apply with full force in actions brought under the Employee Retirement Security Act (ERISA) to collect delinquent trust fund contributions. Southern California Retail Clerks Union and Food Employers Joint Pension Trust Fund v. Bjorklund, 728 F.2d 1262, 1265 (9th Cir. 1984) ("Bjorklund").

In recognition of the fact that millions of workers depend upon employee benefit trust funds for their retirement security, Congress and the courts have acted to simplify trust fund collection actions by restricting the availability of contract defenses, which make collection actions unnecessarily cumbersome and costly. Comment, Denying the Illegality Defense: An Enigmatic Approach to the Delinquent Pension Fund Contribution Problem, 34 Stan. L. Rev. 221, 228 (1981); see, e.g., Lewis v. Benedict Coal Corp., 361 U.S. at 468-71 (precluding the employer from raising a union's strike in violation of the bargaining agreement as a defense to a trust fund collection action based on the same agreement).

In 1980, Congress amended ERISA by adding section 306(a), 298 U.S.C. § 1145, to limit further the range of defenses available in an action for delinquent

trust fund contributions. Bjorklund, 728 F.2d at 1265. Section 306(a) provides:

> Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement.

In two recent cases, we have had occasion to consider the availability of fraud as a defense to an employer's obligation to make trust fund contributions under a collective bargaining agreement. These two decisions arrived at opposite results based upon the different types of fraud involved.

In Bjorklund, the employer signed a collective bargaining agreement relying upon the union representative's false

assurance that the employer himself would be eligible to obtain a pension and that he would not be required to make contributions for his part-time employees. 728 F.2d at 1263-64, 1265. We held that the employer's assertion that he had been "fraudulently induced" to enter into the agreement was not a legitimate defense to the trust fund's collection action. Id. at 1266.

In Operating Engineers Pension Trust v. Gilliam, 737 F.2d 1501, 1503 (9th Cir. 1984) ("Gilliam"), an employer signed a collective bargaining agreement under the impression that he was only applying to become a member of the union as an owner-operator so that he could operate his own equipment on a union job site. When the trust fund brought an action to collect pension fund contributions owing under the agreement, we held he was not obligated to make such payments as he had reasonably

relied on the union's representation that he was signing a document of a wholly different nature. Id. at 1504-05.

The distinction between the types of misrepresentation presented in Bjorklund on the one hand and Gilliam on the other other is the distinction between "fraud in the inducement" and "fraud in the execution" (or "fraud in factum"). The former induces a party to assent to something he otherwise would not have; the latter induces a party to believe the nature of his act is something entirely different than it actually is. See 12 Williston on Contracts § 1488, at 322 (3d ed. 1970). "Fraud in the execution" arises when a party executes an agreement "with neither knowledge nor reasonable opportunity to obtain knowledge of its character or its essential terms." Uniform Commercial Code § 3-305(2)(c); see Restatement (Second) of Contracts § 163 (1981).

This distinction between these two types of fraud may be very significant in determining the rights obtained by third parties as a result of an agreement. Under traditional contract law and negotiable instruments law, personal property or a negotiable instrument transferred by virtue of a misrepresentation may subsequently be transferred to a bona fide purchaser for value or a holder in due course -- innocent third parties who take in good faith and without notice of any defects in the chain of ownership. The defrauded party may recover the property from the bona fide purchaser or avoid honoring the negotiable instrument held by the holder in due course only if the initial transaction was "void" rather than merely "voidable." See J. Calamari & J. Perillo, Contracts, § 9-22, at 293, J. White & R. Summers, Uniform Commercial Code § 14-9, at 572-75 (2d ed. 1980). Fraud in the

execution results in the agreement being void ab initio, whereas fraud in the inducement makes the transaction merely voidable. See 12 Williston on Contracts § 1489, at 341-42.

The district court expressly found that Rozay's Transfer had been "fraudulently induced" into executing the collective bargaining agreement and cited Bjorklund for the proposition that such fraudulent inducement cannot be maintained as a defense in a trust fund collection action.

Indeed, the situation in Bjorklund was quite similar to that presented in the instant case. In Bjorklund, the employer entered into the bargaining agreement upon the assumption that he would be making pension fund contributions only for himself and his one full-time employee, his son. 728 F.2d at 1263-64. Instead, the employer discovered that he was ineligible

for a pension and, in addition, was required to make contributions on behalf of his part-time employees. Id. As in the instant case, the fraudulent misrepresentation in Bjorklund went directly to the employer's central motivation for entering into the agreement. Yet we held that such fraudulent inducement was not the type of defense that could be maintained against a trust fund's collection action.

Rozay's Transfer cannot persuasively contend that fraud in the execution is presented on the facts of this case. Rozay acknowledged at trial that he was fully aware that the document he signed was a collective bargaining agreement and that the agreement was effective as of September 30, 1981, thus obligating the payment of contributions to the trust fund for the disputed period.

To maintain a defense of fraud in the execution, Rozay's Transfer would have to

establish "excusable ignorance of the contents of the writing signed." See Uniform Commercial Code § 3-305 comment 7. But there simply was no confusion as to the actual contents of the agreement. Instead the misrepresentation concerned whether the express provisions of the agreement would in fact be enforced -- an example of fraud in the inducement, as the district court found.

Nor does the district court's finding that there was no "meeting of the minds" concerning the retroactive payment of trust fund contributions provide a legitimate defense to the collection action. Under the facts of this case, the argument that there was no "meeting of the minds" is little more than a restatement of the fraudulent inducement defense. Both stem from the union's oral misrepresentation as to the effect of the bargaining agreement. Rozay's Transfer argues that there was no

"meeting of the minds" because Rozay would not have signed the agreement had he known he would be obligated to make retroactive contributions as required under the express terms of the agreement. However, this is simply another way of saying that the union fraudulently induced Rozay to enter the contract. Indeed, the defense of fraudulent inducement indicates that there has been no proper manifestation of mutual assent. See 1 Williston on Contracts § 20, at 36 (3d ed. 1957).

In sum, the misrepresentation by the union went to Rozay's inducement to enter the agreement, rather than to his understanding of the basic nature of the transaction. Consequently, the bargaining agreement was not "void," but merely "voidable." The claim that a promise to make contributions was merely fraudulently induced is not a legitimate defense to the trust fund's action to recover delinquent

contributions.* Bjorklund, 728 F.2d at 1266.

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* Our decision also comports with the decision in Waggoner v. Dallaire, 649 F.2d 1362 (9th Cir. 1981), later appeal, 767 F.2d 589 (9th Cir. 1985), cert. denied, ___ U.S. ___, 89 L. Ed. 2d 601 (1986). In Waggoner, an employer was fraudulently induced to enter a bargaining agreement by the union's oral representation that the trust fund contributions of the agreement would not be enforced. We held that the express terms of the agreement were to be enforced in favor of the trust fund because oral modification of the employee benefit provisions was forbidden by section 302 of the Labor Management Relations Act, 29 U.S.C. § 186. Id. at 1366. See also Operating Engineers Pension Trust v. Giorgi, No. 85-5823, slip op. at 6-8 (9th Cir. Apr. 28, 1986).

To inhibit corrupt practices between employers and unions, section 302(c)(5) requires that payments from an employer to an employee benefit trust fund be made pursuant to a detailed written agreement. Maxwell v. Lucky Construction Co., Inc., 710 F.2d 1395, 1397-98 (9th Cir. 1983). If oral modifications to the express terms of the agreement by the employer and union were permitted, "[e]mployees, basing their futures on the promise of an old-age pension provided in a union contract, may discover in later years to their surprise that an oral side-agreement had eroded the worth of their pension rights." Waggoner, 649 F.2d at 1366. Accordingly, the unambiguous terms of a collective bargaining agreement providing for employee benefit contributions should prevail in all but the most compelling of circumstances.

IV

ACCORD AND SATISFACTION DEFENSE

Rozay's Transfer characterizes the settlement agreement executed simultaneously with the collective bargaining agreement as an "accord and satisfaction" to resolve the dispute over unpaid contributions. Thus, Rozay's Transfer argues, the settlement agreement bars the trust fund's claim for delinquent contributions.

When Rozay's Transfer ceased making contributions sometime after the expiration of the old bargaining agreement, Local 208 filed an unfair labor practice charge with the NLRB and brought a grievance alleging that the failure to continue making contributions constituted a breach of the expired bargaining agreement. The settlement agreement executed by Rozay's Transfer and Local 208 states that it resolves all disputes between the parties

arising out of the alleged unfair labor practice and provides that the grievance would be withdrawn.

However, the settlement agreement makes no reference to trust fund contributions, while the renewed collective bargaining agreement executed simultaneously expressly provides for contributions to the trust fund effective as of September, 1981, thereby covering the disputed period between May, 1982 and February, 1983.

Rozay's Transfer urges us to read the settlement agreement as addressing the delinquent contributions dispute implicitly through its very silence. However, such a reading provides, at most, that Rozay's Transfer would not be required to pay the delinquent contributions as part of the resolution of the unfair labor practice charge and the grievance. The independent force of the separately adopted collective bargaining agreement still requires

Rozay's Transfer to pay the delinquent contributions.

Although the settlement agreement amends the new collective bargaining agreement with respect to certain provisions concerning wages, holiday pay, and sick leave, it leaves the pension contribution provisions unaltered. Consequently, the express written terms of the bargaining agreement, providing for full pension fund contributions for the disputed period, must be enforced, notwithstanding any oral understandings to the contrary.

V

COUNTERCLAIM TO RECOVER PREVIOUS TRUST FUND CONTRIBUTIONS

Rozay's Transfer filed a counterclaim seeking the refund of $57,235.38 in contributions made to the trust fund between October, 1981 and April, 1982, after the

old collective bargaining agreement had expired and before the new agreement was executed. Rozay's Transfer contended that because such contributions were made during a period when no written agreement was in effect between it and Local 208, the trust fund had no right to accept the contributions under its own rules and under section 302(c)(5) of the LMRA, 29 U.S.C. § 186(c)(5). The district court granted summary judgment against Rozay's Transfer on this counterclaim.

As section 403(c)(2)(A)(ii) of ERISA, 29 U.S.C. § 1103(c)(2)(A)(ii), expressly permits trust funds to return mistakenly paid contributions, we have held it is appropriate to imply a right of action under ERISA in favor of employers to recover contributions mistakenly paid into a pension trust fund. Awards Service, Inc. v. Northern California Retail Clerks Union and Food Employers Joint Pension Trust

Fund, 774 F.2d 1391, 1392 (9th Cir. 1985), cert. denied, 106 S. Ct. 850 (1966); see generally Note, An Employer's Implied Cause of Action for Restitution Under Section 403 of ERISA, 54 Fordham L. Rev. 225 (1985).

However, even after the expiration of the bargaining agreement, Rozay's Transfer was obligated to continue to make contributions to the employee benefit trust fund. Under section 8(a)(5) of the National Labor Relations Act, 29 U.S.C. § 158(a)(5), it is an unfair labor practice for an employer to change unilaterally the conditions and benefits of employment while negotiations for a new bargaining agreement are pending. See generally Laborers Health and Welfare Trust Fund v. Advanced Lightweight Concrete Co., Inc., 779 F.2d 497 (9th Cir. 1985). This obligation to maintain the status quo during continuing negotiations

"encompasses the obligation to continue making pension fund contributions." Producers Dairy Delivery Co., Inc. v. Western Conference of Teamsters Pension Trust Fund, 654 F.2d 625, 627 (9th Cir. 1981). The employer must maintain the benefits and conditions of employment under the expired agreement until the parties negotiate a new agreement or bargain in good faith to impasse. Laborers Health and Welfare Trust Fund, 779 F.2d at 500 & n.3; American Distributing Co., Inc. v. NLRB, 715 F.2d 446, 449 (9th Cir. 1983), cert. denied, 466 U.S. 958 (1984). Rozay's Transfer has not alleged that an impasse was reached in its negotiations with Local 208.

Rozay's Transfer contends that the trust fund's own rules forbade acceptance of contributions made after the expiration of the collective bargaining agreement. In support of this argument, Rozay's

Transfer presents excerpts from letters written by the trust. However, the full text of those letters indicates that the trust was merely summarizing federal law which requires contributions to be made while a current bargaining agreement is in effect or while negotiations are pending:

> As you are aware, the Trust cannot accept pension contributions unless there is a written labor agreement and Employer-Union Pension Certification in effect requiring such contributions or unless negotiations for a new agreement are pending. If you are presently in negotiations, operating under a continuation clause, or the renewed contract is being printed, etc., please advise our office accordingly so that we may continue to accept contributions.

Accordingly, Rozay's Transfer was fully obligated to make pension fund

contributions during this period. Its contributions were not made mistakenly. Moreover, even if the obligation to make those contributions had not existed before, Rozay's Transfer affirmed that obligation by executing the renewed collective bargaining agreement which mandated contributions to the trust fund retroactive to September 30, 1981.

VI

DENIAL OF LEAVE TO IMPLEAD UNION AS THIRD-PARTY DEFENDANT

The district court denied Rozay's Transfer's motion for leave to file a third-party complaint against Local 208 for rescission of the collective bargaining agreement or, in the alternative, for indemnification and for fraud.

Federal Rule of Civil Procedure 14(a) provides that a defending party may implead a third party "who is or may be

liable to him for all or part of the plaintiff's claim against him." The purpose of this rule is to promote judicial efficiency by eliminating the necessity for the defendant to bring a separate action against a third individual who may be secondarily or derivatively liable to the defendant for all or part of the plaintiff's original claim. 6 C. Wright & A. Miller, Federal Practice and Procedure § 1442, at 202-03 (1971).

If the third-party complaint is not filed within ten days after the defendant's original answer is served, then, as in the instant case, the defendant must ask the trial court for leave to implead. The decision whether to implead a third-party defendant is addressed to the sound discretion of the trial court. United States v. One 1977 Mercedes Benz, 708 F.2d 444, 452 (9th Cir. 1983), cert. denied,

464 U.S. 1071 (1984); Rosario v. Amagamated Ladies' Garment Cutters' Union, Local 10, 605 F.2d 1228, 1247 (9th Cir. 1979), cert. denied, 446 U.S. 919 (1980); 6 C. Wright & A. Miller, supra § 1443, at 208.

It is not an abuse of discretion to deny an application for impleader where it will disadvantage the existing action. 6 C. Wright & A. Miller, supra § 1443, at 210. The district court reasonably concluded that impleading the union would be inconsistent with the purposes of ERISA in providing a streamlined and simplified procedure for employee benefit trust funds to collect delinquent contributions. To have granted the impleader might well have complicated and lengthened the trial, and would have introduced the extraneous question of remedies in the third-party action, such as whether the collective bargaining agreement should be rescinded

by reason of the union's allegedly fraudulent conduct.

VII

ATTORNEYS' FEES ON APPEAL

Under ERISA, the award of attorneys' fees is mandatory in all actions by an employee benefit trust fund to collect delinquent contributions. 29 U.S.C. § 1132(g)(2)(D); Lads Trucking Co. v. Board of Trustees of the Western Conference of Teamsters Pension Trust Fund, 777 F.2d 1371, 1373 (9th Cir. 1985); Operating Engineers Pension Trust v. Reed, 726 F.2d 513, 514 (9th Cir. 1984).* This mandate

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* Section 1132(g)(2) provides that:
In any action under this subchapter by a fiduciary for or on behalf of a plan to enforce section 145 of this title in which a judgment in favor of the plan is awarded, the court shall award the plan--
. . . .
(D) reasonable attorney's fees and costs of the action, to be paid by the defendant . . . .

includes the recovery of attorneys' fees incurred on appeal. See Carpenters Southern California Administrative Corp. v. Russell, 726 F.2d 1410, 1417 (9th Cir. 1984).

As the prevailing party in this appeal, Southwest Administrators, Inc., as assignee of the trust fund, is entitled to a reasonable attorneys' fee. After the mandate issues, the district court will assess a reasonable attorneys' fee for this appeal.

AFFIRMED.

Appendix F

United States District Court

Central District Of California

Case No. CV-83-8313 MRP (Bx)

ROZAY'S TRANSFER,

Plaintiff,

vs.

LOCAL FREIGHT DRIVERS, LOCAL 208 INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Defendants.

MRP FINDINGS OF FACT AND CONCLUSIONS OF LAW

[Dated June 23, 1986]

The above-entitled cause came on regularly for trial on January 14, 1986 before

the Honorable Mariana R. Pfaelzer, United States District Judge, sitting without a jury. Stephen P. Pepe and Cliff Fonstein, of the law firm of O'Melveny & Myers, appeared as counsel for plaintiff, and Robert D. Vogel of the law firm of Wohlner, Kaplon, Phillips, Vogel, Shelley & Young appeared as counsel for defendant. The trail was conducted pursuant to the Pretrial Conference Order, the narrative statements of witnesses, the testimony and documentary evidence introduced at trial, and the oral arguments of counsel. The cause having been submitted to the Court for decision, the Court now makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. Plaintiff Rozay's Transfer ("Rozay's") is a California corporation engaged in the trucking industry in

Southern California. (See Stipulated Fact "a" in Pretrial Conference Order ("Stipulated Fact a."))

2. The truck drivers and dock workers employed by Rozay's are now and for several years have been represented for purposes of collective bargaining by defendant Local Freight Drivers, Local 208, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America ("Local 208"). (See Stipulated Fact b.)

3. Rozay's and Local 208 were parties to a collective bargaining agreement ("Agreement") and an Employer-Union Pension Certification ("Certification") which expired on September 30, 1981. (See Stipulated Fact c.)

4. The Agreement and Certification which expired on September 30, 1981 required Rozay's to make contributions to the Western Conference of Teamsters Pension Trust Fund ("Trust Fund") on behalf

of employees represented by Local 208. The Trust Fund is an employee pension benefit plan within the meaning of the Employee Retirement Income Security Act (See Stipulated Fact d.)

5. Rozay's made regular contributions to the Trust Fund during the life of the Agreement and Certification and continued to make contributions after the expiration and through April, 1982, while Local 208 and Rozay's attempted to negotiate a renewal Agreement and Certification. (See Stipulated Fact e.)

6. On or about April 18, 1982, Local 208 presented a rough draft of a new collective bargaining agreement to Rozay's. After reviewing the draft, on May 6, 1982, Rozay's returned it unsigned to Local 208 with several corrections. (See Stipulated Fact f.)

7. Also on May 6, 1982, Rozay's Vice President, Richard Fletcher ("Fletcher"),

raised with Local 208 Business Agent, Eddie McKiernan ("McKiernan"), Rozay's severe economic problems and explained that in order to stay in business, Rozay's would need a reduction in labor costs. Rozay's specifically proposed cessation of pension contributions, and reduced holiday, vacation, and sick leave benefits. (See Stipulated Fact g.)

8. On April 26, 1982, the Trust Fund wrote and informed Rozay's that it could not accept pension contributions unless there was a signed collective bargaining agreement in force between Rozay's and Local 208. (Trial Exhibit No. 11.) On June 30, 1982, the Trust Fund wrote a substantially similar letter to Rozay's. (Trial Exhibit No. 12.)

9. On June 8, 1982, Fletcher again raised the needed concessions with McKiernan and with Local 208's Secretary-Treasurer, Alex Maheras ("Maheras").

Maheras requested that Rozay's make the proposal in the form of a letter. (See Stipulated Fact i.)

10. On June 11, 1982, Fletcher on behalf of Rozay's wrote to Maheras to propose labor concessions. Specifically, Fletcher proposed the following: cessation of pension contributions; elimination of one week's vacation; elimination of two personal holidays; and elimination of five days' sick leave. This letter was sent via certified mail. (Trial Exhibit No. 16.)

11. Local 208 received the letter of June 11, 1982, but made no reply. (See Stipulated Fact k.)

12. On June 28, 1982, on behalf of Rozay's, Fletcher sent a second letter to Local 208. Fletcher stated that having received no response to its June 11, 1982 letter, Rozay's assumed that the union had no objections to its proposed changes, and

the changes would be implemented on July 6, 1982. This second letter was also sent by certified mail. (Trial Exhibit No. 17.)

13. Local 208 received Rozay's letter of June 28, 1982, but made no reply. (See Stipulated Fact m.)

14. Rozay's implemented the proposals outlined in its June 11, 1982 letter to Local 208 effective July 6, 1982. (See Stipulated Fact n.)

15. Several months after Rozay's ceased making pension contributions to the Trust Fund, Local 208 filed an unfair labor practice charge with the National Labor Relations Board (the "NLRB" or "Board"). The charge was filed on September 20, 1982 and amended on November 1, 1982, under Board Case No. 21-CA-21591. (Trial Exhibits Nos. 18, 19.) Local 208 also filed a grievance pursuant to the grievance and arbitration

provisions of the expired Agreement. (Trial Exhibit No. 20.) The Board charge alleged that the cessation of the payment of pension contributions constituted an unfair labor practice, and the grievance alleged that it was a breach of the collective bargaining agreement.

16. On January 17, 1983, William S. Rozay ("Mr. Rozay"), President of Rozay's, met with Maurice E. Anderson ("Anderson"), International Vice President of the International Brotherhood of Teamsters, and Archie Murrietta ("Murrietta"), President of Local 208. The purpose of this meeting was to resolve the NLRB case then pending between Rozay's and Local 208. This meeting took place in Anderson's office. (See Stipulated Fact q.) At all times during his dealings with Rozay's, Murrietta was acting as agent of and on behalf of Local 208.

17. At the January 17, 1983 meeting, Rozays's and Local 208 reached a settlement of the NLRB case. Among the terms agreed to were a reduction of hourly wages by $1.00 per hour and resumption of the payment of pension contributions prospectively. The pension contributions were 98¢ per hour for each employee.

18. At this January 17, 1983 meeting, Anderson agreed to ask the Trust Fund to waive retroactive pension contributions for the period of May 1982 to February 1983. He represented to Mr. Rozay that the Trust Fund had forgiven the unpaid pension contributions of other employers under similar circumstances. (See Stipulated Fact r.)

19. On January 21, 1983, Mr. Rozay sent Murrietta a letter confirming the terms of the January 17, 1983 agreement. (Trial Exhibit No. 13.) Mr. Rozay stated in his letter that under the agreement,

retroactive contributions would not be required. On January 26, 1983 Murrietta replied to Mr. Rozay's letter, and did not disagree with or question the statement that there would be no retroactive pension contributions. (Trial Exhibit No. 14.)

20. On January 26, 1983, Murrietta wrote a letter to the Trust Fund, requesting that Rozay's be relieved from paying pension contributions for the months of July 1982 through January 1983. He sent a copy of this letter to Mr. Rozay. (Trial Exhibit No. 1.)

21. On February 16, 1983 the Trustees of the Trust Fund met to consider, among other agenda items, whether to forgive Rozay's unpaid pension contributions for the months of May, 1982 through February, 1983. The Trustees voted not to forgive the payment of these contributions. (Trial Exhibit No. 6.)

22. On or about March 4, 1983, Michael Uranga, an employee of Southwest Administrators, the entity who administers the Trust Fund in Southern California, told Murrietta at a social gathering, a Teamsters' Joint Council meeting, that the Trustees had voted not to forgive the payment of the unpaid contributions. (See Stipulated Fact y.)

23. On March 8, 1983, Local 208 and Rozay's executed a collective bargaining agreement (Trial Exhibit No. 4), an Employer-Union Pension Certification (Trial Exhibit No. 5), and a settlement agreement (the "Side Agreement") (Trial Exhibit No. 15) which resolved all pending disputes between Rozay's and Local 208 involving the Board charge and the grievance.

24. At the time that Murrietta and Mr. Rozay signed the March 8, 1983 collective bargaining agreement, Murrietta knew

that the Trustees had voted not to forgive Rozay's unpaid contributions, but he did not disclose this fact to Mr. Rozay. The existence of an obligation to pay the $76,133.29 in unpaid contributions was a material fact. Murrietta did not disclose this fact to Mr. Rozay because he knew that if Mr. Rozay was told that the past contributions would not be forgiven, Mr. Rozay would not execute the collective bargaining agreement. Murrietta fraudulently induced Mr. Rozay's execution of the collective bargaining agreement. When he committed these fraudulent acts, Murrietta was acting as an agent of and on behalf of Local 208.

25. At the time that Murrietta and Mr. Rozay signed the March 8, 1983 collective bargaining agreement, the Employer-Union Pension Certification and the Side Agreement, there was no meeting of the minds between Rozay's and Local 208 on the

issue of retroactive pension contributions. The Trustees' decision on February 16, 1983 not to grant Rozay's relief from paying the retroactive pension contributions changed the essential character and nature of the agreement which Rozay's and Local 208 reached on January 17, 1983 and which agreement Mr. Rozay believed he was executing on March 8, 1983.

26. Murrietta by not disclosing the material fact that the past due pension contributions would not be forgiven deprived Rozay's of the opportunity to renegotiate its agreement for economic relief with Local 208 or to refuse to sign the collective bargaining agreement and the Employer-Union Pension Certification and thus avoid the $76,133.29 pension liability.

27. By letter dated March 24, 1983, the Trust Fund notified Murrietta and Mr. Rozay of its decision not to forgive

the payment of the unpaid contributions. (Trial Exhibit No. 2.) Rozay's first learned of the Trustees' decision through this letter.

28. On or about June 20, 1983, the Trust Fund filed an action in this Court captioned, Southwest Administrators, Inc. v. Rozay's Transfer, Case No. 83-4194-MRP ("Southwest Administrators") seeking recovery of the unpaid pension contributions, along with interest, liquidated damages, and attorneys' fees. In that action, plaintiff Southwest Administrators, Inc., was the assignee and representative of the Trust Fund. (See Stipulated Fact ff.)

29. Rozay's did not learn of Local 208's fraudulent conduct until April 11, 1984 when in the course of litigating the Southwest Administrators case, Rozay's deposed Michael Uranga, a Trust official. During his deposition, Uranga admitted

telling Murrietta and Anderson before the January 17, 1983 meeting that the Trust would not forgive the unpaid contributions. Uranga also disclosed that the Trustees' decision not to forgive Rozay's unpaid contributions was made on February 16, 1983. The deposition transcript was served on the parties on April 30, 1984. After waiting thirty days for Uranga to sign the deposition, Rozay's filed, on July 6, 1984, a motion for leave to file a third party complaint against Local 208 for fraud.

30. At the trial of the Southwest Administrators case, on March 12, 1985, Murrietta for the first time admitted knowing of the Trustees' decision before March 8, 1983. Until March 12, 1985, Murrietta denied knowing of the Trustees' decision prior to March 8, 1983.

31. In Southwest Administrators, this Court held that Rozay's was liable to the

Trust Fund for the unpaid pension contributions and entered judgment in favor of Southwest Administrators in the amount of $122,789.03. Added to the amount of back pension contributions ($76,133.29) was $15,226.65 in liquidated damages, $25,039.09 in interest, and $6,390.00 in attorney's fees. The interest Rozay's owes is continuing to accrue pending appeal of Southwest Administrators. (See Stipulated Fact ii.)

32. Rozay's spent approximately $22,010.37 in attorneys' fees and costs defending the Southwest Administrators case in the district court. Rozay's has currently spent approximately $17,663.21 in attorneys fees and costs in appealing the Southwest Administrators case. Rozay's has currently spent approximately $9,304.89 in prosecuting the present case.

CONCLUSIONS OF LAW

1. Local 208, through its agent Murrietta, intentionally concealed the Trustees' decision from Mr. Rozay, knowing that this decision was a material fact which changed the essential nature of the collective bargaining agreement. Murrietta did not disclose this fact to Mr. Rozay because he knew that if Mr. Rozay was told that the past contributions would not be forgiven, Mr. Rozay would not execute the collective bargaining agreement. Mr. Rozay justifiably relied upon the intentional misrepresentation of Murrietta when signing the agreement. Such conduct on the part of Local 208 constitutes fraud. See, e.g., Pence v. United States, 316 U.S. 332, 338, 62 S. Ct. 1080, 1083, 86 L.Ed. 1510, 1515 (1942) (describing elements of fraud); Hart v. McLucas, 535 F.2d 516 (9th Cir. 1976) (accord); Greene v. Gibraltar Morts.

Inv. Corp., 488 F. Supp. 177, 179 (D.C. D.C. 1980) (omission or concealment of material facts can constitute a misrepresentation, just as a positive, direct assertion can).

2. Local 208, through its agent Murrietta, by intentionally concealing the Trustees' decision from Mr. Rozay, deprived Rozay's of the opportunity to refuse to sign the collective bargaining agreement and avoid retroactive pension contributions of $76,133.92 or of renegotiating its collective bargaining agreement with Local 208.

3. Because Mr. Rozay justifiably relied on the intentional misrepresentation of Murrietta, acting as agent of Local 208, when he signed the March 8, 1983 Agreement which gave rise to Rozay's liability to the Trust, Local 208 is required to indemnify Rozay's the full amount of Rozay's damages arising from such fraud.

Great American Ins. Co. v. Evans, 269 F. Supp. 151, 157 (N.D. Cal. 1967) (the principle behind indemnification is that everyone should be responsible for the consequences of his or her own wrong, and if others by reason of a lesser kind of liability have been compelled to pay damages, then they may recover from the real wrongdoer); Graphic Arts International Union, Local No. 280 v. NLRB, 596 F.2d 909, 910 (9th Cir. 1979) (union required to make employer whole for any financial expenditures made pursuant to a labor contract coerced in violation of the National Labor Relations Act); Moe v. Transamerica Title Ins. Co., 21 Cal. App. 3d 289, 303, 98 Cal. Rptr. 547 (1971) (a person who is required through the tort of another to act in protection of his interest by defending an action against a third party is entitled to recover as damages, compensation for the reasonably necessary

attorneys' fees incurred). Such indemnification includes:

a. The amount of Rozay's liability to the Trust Fund in the Southwest Administrators case, including interest subsequently accrued;

b. Rozay's legal fees in defending the Southwest Administrators case in the district court; and

c. Rozay's legal fees in appealing the Southwest Administrators case.

4. The 1981-1984 collective bargaining agreement between Rozay's and Local 208 is null, void, rescinded and is without effect because, as a result of Local 208's fraud, there never was a meeting of the minds on the essential, material and critical issue of retroactive pension contributions. Boeing Airplane Co. v. Aeronautical Industrial Dist. Lodge, 188 F.2d 356, 357 (9th Cir.) cert. denied, 342 U.S. 821, 72 S. Ct. 39, 96 L.Ed. 621

(1951) (strike by union is material breach of collective bargaining agreement justifying employer's rescission of the agreement).

5. The Court denies Rozay's request for attorneys' fees in the present action.

6. The Court denies Rozay's request for punitive damages in the present action.

DATED: June 23, 1986.

/s/ Mariana R. Pfaelzer
MARIANA R. PFAELZER
United States District Judge

Appendix G

United States District

Court of Appeals

For The Ninth Circuit

Nos. 84-5689/85-6020

D.C. No. CV-83-4194 MRP (Bx)

SOUTHWEST ADMINISTRATORS, INC.,

Plaintiff/Appellee,

vs.

ROZAY'S TRANSFER, a California

Corporation,

Defendant/Appellant.

ORDER

[Filed August 28, 1986]

Before: WALLACE, PREGERSON, and BEEZER,

Circuit Judges

The opinion, filed June 10, 1986, is amended by the addition of a new footnote 4 at page 17, line 26, following "conduct.", to read as follows:

> 4/ Subsequent to the entry of judgment by the district court in this trust fund collection action, Rozay's Transfer initiated a separate action against Local 208 alleging fraudulent misrepresentation. On July 2, 1986, the district court entered judgment in favor of Rozay's Transfer granting rescission of the collective bargaining agreement and awarding indemnification from Local 208 for contributions owing to the trust fund as a result of the union's fraudulent misconduct. Rozay's Transfer v. Local Freight Drivers, Local 208, No. CV 84-8313 MRP (Bx) (C.D. Cal. July 2, 1986).
>
> This subsequent judgment in the related case does not affect our

conclusion in the instant case. Rozay's Transfer remains obligated as a result of this action to pay delinquent contributions to the trust fund under § 515 of ERISA, 29 U.S.C § 1145. However, Rozay's Transfer may now be entitled to indemnification for liability incurred as a result of this collective action appeal.

Footnote 4 on page 18, line 8 is renumbered as footnote 5.

The panel has unanimously voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing and the amendment to the opinion. No judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is DENIED, and the suggestion for rehearing en banc is REJECTED.

APPENDIX H

The provisions of ERISA Sections 2(a), 3(2), 3(37)(A), 502(a), 29 U.S.C. §§ 1001(a), 1002(2), 1002(37)(A), and 1132(a) are set forth below:

> "Sec. 2(a). The Congress finds that the growth in size, scope, and numbers of employee benefit plans in recent years has been rapid and substantial; that the operational scope and economic impact of such plans is increasingly interstate; that the continued well-being and security of millions of employees and their dependents are directly affected by these plans; that they are affected with a national public interest; that they have become an important factor affecting the stability of employment and the successful development of industrial relations; that they have

become an important factor in commerce because of the interstate character of their activities, and of the activities of their participants, and the employers, employee organizations, and other entities by which they are established or maintained; that a large volume of the activities of such plans is carried on by means of the mails and instrumentalities of interstate commerce; that owing to the lack of employee information and adequate safeguards concerning their operation, it is desirable in the interests of employees and their beneficiaries, and to provide for the general welfare and the free flow of commerce, that disclosure be made and safeguards be provided with respect to the establishment, operation, and administration of such plans; that they substantially affect the

revenues of the United States because they are afforded preferential Federal tax treatment; that despite the enormous growth in such plans many employees with long years of employment are losing anticipated retirement benefits owing to the lack of vesting provisions in such plans; that owing to the inadequacy of current minimum standards, the soundness and stability of plans with respect to adequate funds to pay promised benefits may be endangered; that owing to the termination of plans before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits; and that it is therefore desirable in the interests of employees and their beneficiaries, for the protection of the revenue of the United States, and to provide for the free flow of commerce, that

minimum standards be provided assuring the equitable character of such plans and their financial soundness.

". . . .

"Sec. 3. For purposes of this subchapter:

". . . .

"(2)(A) Except as provided in subparagraph (B), the term 'employee pension benefit plan' and 'pension plan' mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program--

"(i) provides retirement income to employees, or

"(ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond,

"regardless of the method of calculating the contributions made to the plan, the method of calculating the benefits under the plan or the method of distributing benefits from the plan.

"(B) The Secretary may by regulation prescribe rules consistent with the standards and purposes of this chapter providing one or more exempt categories under which--

"(i) severance pay arrangements, and

"(ii) supplemental retirement income payments, under which the pension benefits of

retirees or their beneficiaries are supplemented to take into account some portion or all of the increases in the cost of living (as determined by the Secretary of Labor) since retirement,

"shall, for purposes of this subchapter, be treated as welfare plans rather than pension plans. In the case of any arrangement or payment a principal effect of which is the evasion of the standards or purposes of this chapter applicable to pension plans, such arrangement or payment shall be treated as a pension plan.

". . . .

"(37)(A) The the term 'multiemployer plan' means a plan--

"(i) to which more than one employer is required to contribute,

"(ii) which is maintained pursuant to one or more collective bargaining agreements between one or more employee organizations and more than one employer, and

"(iii) which satisfies such other requirements as the Secretary may prescribe by regulation.

"(B) For purposes of this paragraph, all trades or businesses (whether or not incorporated) which are under common control within the meaning of section 1301(b)(1) of this title are considered a single employer.

"(C) Notwithstanding subparagraph (A), a plan is a

multiemployer plan on and after its termination date if the plan was a multiemployer plan under this paragraph for the plan year preceding its termination date.

"(D) For purposes of this subchapter, notwithstanding the preceding provisions of this paragraph, for any plan year which began before September 26, 1980, the term 'multiemployer plan' means a plan described in this paragraph (37) as in effect immediately before such date.

"(E) Within one year after September 26, 1980, a multiemployer plan may irrevocably elect, pursuant to procedures established by the corporation and subject to the provisions of sections 1453(b) and (c) of this title, that the plan shall not be treated as a

multiemployer plan for all purposes under this chapter or Title 26 if for each of the last 3 plan years ending prior to the effective date of the Multiemployer Pension Plan Amendments Act of 1980--

"(i) the plan was not a multiemployer plan because the plan was not a plan described in subparagraph (A)(iii) of this paragraph and section 414(f)(1)(C) of Title 26 (as such provisions were in effect on the day before September 26, 1980); and

"(ii) the plan had been identified as a plan that was not a multiemployer plan in substantially all its filings with the corporation, the

Secretary of Labor and the Secretary of the Treasury.

"Sec. 502(a). A civil action may be brought--

"(1) by a participant or beneficiary--

"(A) for the relief provided for in subsection (c) of this section, or

"(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

"(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

"(3) by a participant, beneficiary, or fiduciary (A) to

enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

"(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title;

"(5) except as otherwise provided in subsection (b) of this section, by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii)

to enforce any provision of this subchapter; or

"(6) by the Secretary to collect any civil penalty under subsection (i) of this section."

Section 1254(1) of Title 28 of the U.S. Code is set forth below:

"Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

"(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition or judgment or decree; . . ."

CERTIFICATE OF SERVICE

No. _____

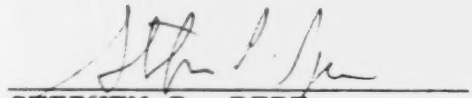
In The Supreme Court
of the
United States

OCTOBER TERM, 1986

ROZAY'S TRANSFER, A
CALIFORNIA CORPORATION,
Petitioner,
vs.
SOUTHWEST ADMINISTRATORS, INC.,
Respondent.

I, Stephen P. Pepe, a member of the Bar of this Court, hereby certify that on this 24th day of November, 1986 three copies of the Petition for Writ of Certiorari in the above-entitled case were mailed, first class postage prepaid, to James Oswald, Davies, Roberts, Reid & Wacker, Suite 500, 201 Elliott Avenue West, Seattle, Washington 98119, counsel for respondent and that one copy was mailed

to Robert D. Vogel, Wohlner, Kaplon, Phillips, Vogel, Shelley & Young, 1545 Wilshire Boulevard, Suite 211, P.O. Box 17925, Los Angeles, California 90017, counsel for Amicus Curiae at Oral Argument before the United State Court of Appeals for the Ninth Circuit. I further certify that all parties required to be served have been served.



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